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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

BY

CHARLES ALLEN.

VOLUME VIII.

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY.
HON. THERON METCALF.
HON. PLINY MERRICK.
(Resigned August 15th 1864.)
HON. EBENEZER R. HOAR.
HON. REUBEN A. CHAPMAN.
HON. HORACE GRAY, JR.
(Appointed August 23d 1864.)

ATTORNEY GENERAL.

HON. DWIGHT FOSTER.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

JANUARY TERM 1864, AT BOSTON.

PRESENT:

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. PLINY MERRICK,
HON. EBENEZER R. HOAR,
HON. REUBEN A. CHAPMAN,
} JUSTICES.

ESSEX COUNTY.

LYDIA H. PETTINGILL *vs.* WARREN PORTER & others.*

The recitals in a recent deed, as to the ownership and boundaries of land adjoining that which is conveyed therein, are not admissible in evidence against one who has subsequently become the owner of the granted premises, and who claims a right of way over the adjoining land, as appurtenant to other land held by him under a prior deed from the same grantor; although both the grantor and grantee are dead.

No exception lies to the refusal of a judge to rule as a matter of law upon a question which involves the determination of facts in dispute.

A way over other land of the grantor in a deed may pass as appurtenant to the land granted, although there are no insuperable physical obstacles to prevent access by another way, if such other way cannot be made without unreasonable labor and expense; and, in determining this question, a jury may consider the comparative value of the land and the probable cost of such a way.

TORT to recover damages for the obstruction of a way, by erecting a fence across it. The action was originally brought

* This case and the following eight cases were argued in January 1863.

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by Moses Pettingill, and after his death was prosecuted by the plaintiff as his administratrix.

At the second trial in the superior court, before *Ames*, J., after the decision reported in 3 Allen, 349, the plaintiff claimed the right of way in question as appurtenant to a certain piece of land owned by her intestate in his lifetime, with a dwelling-house thereon; and introduced in evidence a deed thereof from Warren Porter to Moses Welch, dated December 8, 1846, and a subsequent deed thereof from Welch to Moses Porter, and of the administrator of Porter to her intestate. Neither of these deeds contained any express grant of the way; but conveyed the land, with all the privileges and appurtenances thereto belonging.

The defendants, for the purpose of taking advantage of the recitals contained therein as to the boundaries and ownership of the adjoining estate, over which the way was alleged to exist, offered in evidence a deed of Warren Porter to Moses Welch, dated June 14, 1848, conveying a small lot of land, and describing the lot over which the way was alleged to exist as land of the grantor. The land conveyed by this deed was subsequently conveyed to the plaintiff's intestate. This deed was excluded, although it was shown that the grantor and grantee named therein were both dead.

It appeared that the estate conveyed by Warren Porter to Moses Welch, described in the deed put in by the plaintiff, was part of a larger estate, which said Warren Porter took by devise from his late father, Zerubbabel Porter; and it also appeared that, from a period before the commencement of the present century to the time of Warren Porter's last described deed, Warren Porter or his father owned all this larger estate. It also appeared that a small lot, which adjoined or was carved out of this larger one, was conveyed by Zerubbabel Porter in his lifetime, through a third person, to Mary Porter, his wife; that she died intestate in the lifetime of her husband, (who died in 1845,) leaving Warren Porter aforesaid and Elias Endicott Porter as her heirs at law. Adjoining to the smaller and larger estate was a triangular piece of land, claimed by the defendants to fall

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partly within the larger and partly within the smaller lot, and to have been originally a part of the highway. The plaintiff's deed included part of it, and the fence complained of was erected upon the boundary line. The record of the court of sessions was produced, by which it appeared that, if this constituted a part of the highway, it was discontinued in 1807. Evidence was introduced, but not of any witness who remembered as far back as the discontinuance of the highway, or farther back than the time when Zerubbabel Porter owned both the large and small lot, of the use of the alleged way over this triangular piece of land. It appeared that the triangular piece of land had lain open from time out of mind, and no evidence as to the ownership was offered, except what appeared from the title to the adjoining lots and the discontinuance of the highway; but the ownership was in dispute, and it was also in dispute whether the same was ever a part of the highway, and discontinued as aforesaid.

The defendants requested the court to rule that there was no evidence of the existence of any right of way by prescription up to the time of Warren Porter's conveyance to Moses Welch, less than twenty years before the date of the plaintiff's writ; but the judge refused so to rule.

The judge ruled that no right of way over what was Warren Porter's land when he made the conveyance to Moses Welch would pass by that deed, unless it appeared that the grantee could not obtain access to his place by another route, without unreasonable labor and expense. It appeared that the estate conveyed had a large front upon the highway; that there were no insuperable physical obstacles, such as ledges, swamps, or the like; that the soil was light and easily worked; that the road and adjoining estate, especially in front of the plaintiff's house, were about upon a level; and there was no evidence to show that any greater difficulty would be found in constructing the road suggested than over any field through which it might be necessary to construct a carriage road, or at any rate nothing more than a single culvert to allow the passage of surface water after heavy rains. Upon this state of facts, the defendants requested

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the court to rule, as matter of law, that there was no evidence to be considered by the jury of the necessity of unreasonable labor and expense in constructing a new road. The judge refused so to rule, but ruled that the deed under which the plaintiff claimed conveyed whatever was necessary to the beneficial enjoyment of the estate granted, and in the power of the grantor to convey; that it was not enough for the plaintiff to prove that the way claimed would be convenient and beneficial, but she must also prove that no other way could be conveniently made from the highway to her intestate's house, without unreasonable labor and expense; that unreasonable labor and expense means excessive and disproportionate to the value of the property purchased; and that it was a question for the jury, on all the evidence, whether such new way could be made without such unreasonable labor and expense.

Under this ruling, the plaintiff introduced evidence as to the amount of labor and expense necessary for the construction of such new way; and both parties introduced experts, who computed the probable cost of constructing a new road. The plaintiff argued, by comparison with the consideration money named in the deed, that the cost of a new road would be out of proportion to the cost of the land. No evidence was offered of the value of the land. The defendants' counsel requested the court to instruct the jury that such a comparison would be irregular, and that it did not appear that the consideration money paid was not less than it would have been if the necessity for building the new road had not existed. The judge ruled that the jury might take into consideration the probable cost of a new road, compared with the value of the land, but did not instruct them as requested, as to inferences from the consideration named in the deed.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

S. H. Phillips, (*J. C. Perkins* with him,) for the defendants. The deed which was offered should have been admitted in evidence, because the plaintiff's intestate was privy in estate to the grantor, and was therefore bound by its recitals; *Fitch* v.

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Baldwin, 17 Johns. 161; *Jackson* v. *Ayres*, 14 Johns. 224; *Carver* v. *Jackson*, 4 Pet. 88; because the acceptance of it was an act against the interest of Moses Welch, who is deceased; 1 Stark. Ev. 62; and because it was a solemn and public declaration amounting to a claim of title by Warren Porter. *Somes* v. *Skinner*, 3 Pick. 60. *Bates* v. *Norcross*, 14 Pick. 224. 1 Stark. Ev. 64. There was no evidence of adverse use of the way prior to 1845. The possession, if not the title, was united during the life of Zerubbabel Porter. The defendants were entitled to an express ruling that there was no evidence for the jury of the necessity of unreasonable labor and expense in constructing a new way. *Collins* v. *Pierce*, 7 Gray, 18. *Chase* v. *Breed*, 5 Gray, 445. *Thayer* v. *Payne*, 2 Cush. 332. *Johnson* v. *Jordan*, 2 Met. 234. *Nichols* v. *Luce*, 24 Pick. 102. *Grant* v. *Chase*, 17 Mass. 443. *Gayetty* v. *Bethune*, 14 Mass. 49. *Tracy* v. *Atherton*, 1 Amer. Law Reg. (N. S.) 742, and cases cited. *Proctor* v. *Hodgson*, 10 Exch. 826. There was no evidence of the value of the land; and the presumption is that the consideration had been reduced on account of the necessity for a new way.

W. C. Endicott, for the plaintiff.

Chapman, J. 1. The plaintiff claims title in her intestate, to the land to which the alleged way is claimed as appurtenant, under a deed of Warren Porter to Moses Welch. The defendants offered in evidence a subsequent deed from Warren Porter to Moses Welch, conveying an adjoining tract of land. The plaintiff does not claim that the alleged way was appurtenant to the land conveyed in this deed, and the defendant offered it for the purpose of taking advantage of the recitals therein as to the boundaries and ownership of the adjoining estate, over which the alleged way passed. This evidence was properly excluded, because, although both the parties were dead, it was a recent transaction; and because, if it tended to show that Warren Porter claimed title to the adjoining estate in 1848, it cannot be inferred therefrom that he claimed such title in 1846, when he made the other deed to Welch.

2. The defendants requested the court to instruct the jury that there was no evidence of the existence of any right of way

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by prescription, up to the time when Warren Porter conveyed to Moses Welch in 1846. It sufficiently appeared that the way had been used; but the request was based upon the alleged ground that Warren Porter owned the triangular piece over which the way passed. But questions of fact were in dispute as to the actual position and boundaries of the lots, and the question appears to have been properly left to the jury.

3. The defendants object to the qualified ruling of the court, that no right of way over what was Warren Porter's land would pass by the deed relied on by the plaintiff, unless it appeared that the grantee could not obtain access to his house by another route, without unreasonable labor and expense. This instruction was based on the assumption of the defendants that Warren Porter owned the triangular piece when he made his first deed to Welch. It appears that the only way which he had been accustomed to pass over to reach the highway had been across this triangular piece; and the question which arose between the parties was, whether, as he did not convey the triangular piece, or expressly convey a right of way over it, such right passed under the grant of "all the privileges and appurtenances thereto belonging."

The instruction on this subject was, "that the deed under which the plaintiff claimed conveyed whatever was necessary to the beneficial enjoyment of the estate granted, and in the power of the grantor to convey; that it was not enough for the plaintiff to prove that the way claimed would be convenient and beneficial, but she must also prove that no other way could be conveniently made from the highway to her intestate's house, without unreasonable labor and expense; that unreasonable labor and expense means excessive and disproportionate to the value of the property purchased; and that it was a question for the jury, on all the evidence, whether such new way could be made without such unreasonable labor and expense."

The court are of opinion that this instruction was correct. The word "necessary" cannot reasonably be held to be limited to absolute physical necessity. If it were so, the way in question would not pass with the land, if another way could be

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made by any amount of labor and expense, or by any possibility. If, for example, the property conveyed were worth but one thousand dollars, it would follow from this construction that the plaintiff's intestate would not have the right of way over the triangular piece as appurtenant to the land, provided he could have made another way at an expense of one hundred thousand dollars. If the word "necessary" is to have a more liberal and reasonable interpretation than this, the one adopted by the judge must be regarded as correct. Its effect was, to require proof that the way over this triangular piece was reasonably necessary to the enjoyment of the dwelling-house granted. See *Ewart* v. *Cochrane*, 7 Jur. (N. S.) 925; *Leonard* v. *Leonard*, 2 Allen, 543; *Carbrey* v. *Willis*, 7 Allen, 364.

4. As the facts were properly submitted to the jury, and evidence was admissible as to the consideration paid for the land and the cost of making a way, it was proper that the jury should compare the facts together and make such inferences as they should think reasonable. The instruction on this point was correct. *Exceptions overruled.*

SAMUEL EASTER & another *vs.* IRA H. ALLEN.

If goods have been obtained from their owner by fraud and false pretences, the burden of proof is upon one who claims under a subsequent purchase to show that he was a purchaser for a valuable consideration without notice.

In an action of replevin of goods obtained from their owner without payment and by fraud and false pretences, against one who claims under a subsequent purchase, the intent to defraud cannot be shown by evidence of declarations, not relied upon as a part of the false pretences by which the goods were obtained, but made, after the completion of that transaction, by a third person to whom the plaintiff was referred by the vendee for information, and in reply to inquiries put by the plaintiff; nor can such intent to defraud be shown by evidence that the plaintiff found on inquiry that a third person whom that vendee subsequently introduced to him as doing business at a particular place, did not do business there.

In an action of replevin of goods obtained from their owner by fraud and false pretences against one who claims under a subsequent purchase, it may be shown by cross-examination of the plaintiff that a few days before the trial he made a complaint against the person who obtained the goods from him for obtaining them under false pretences, and caused him to be arrested on the morning of the trial.

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Easter & another *v.* Allen.

Replevin. At the trial in the superior court, before *Brigham* J., the plaintiffs introduced evidence tending to show that the goods were obtained from them by N. Allen without payment, and by fraud and false pretences. For the purpose of showing the fraudulent intent of Allen, they offered evidence to show that, two days after the transaction with the plaintiffs, Allen went into a store in Boston to purchase goods, and informed the salesman that he had taken a lease of a store and was going into business, and gave the name of D. P. Dodge as a reference, as to the truth of his statements; and they offered to show what Dodge said, in reply to inquiries made of him by the salesman. It was not contended that the answers of Dodge were a part of the pretences under which the plaintiff's goods were obtained, or that they were false; and the judge rejected the evidence. The plaintiffs also offered to show that, in a subsequent interview with the same salesman, Allen introduced to him one J. T. Dodge, as a dealer in fluid lamps on Tremont Row, in Boston; and that the salesman inquired at Tremont Row, and found that said Dodge was not a dealer in fluid lamps there. This evidence was rejected.

One of the plaintiffs testified as a witness, and the defendant offered to show, by cross-examination of him, that five days before the trial he made a complaint against N. Allen for obtaining the goods by false pretences, and that the warrant which issued thereon was served on the morning of the trial, by arresting Allen. This evidence was objected to, but the judge admitted it, for the sole purpose of showing bias or interest, and thus of affecting the credibility of the witness.

The judge instructed the jury that, it being agreed that the goods came into the possession of the defendant by a transaction which had the form of a sale, the burden of proof was on the plaintiffs to show, by a preponderance of testimony, not only that the goods were obtained by said N. Allen by false pretences, but that the defendant was not an innocent purchaser.

The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

G. E. Betton, for the plaintiffs.

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S. B. Ives, Jr., (*H. G. Johnson* with him,) for the defendant. A sale procured by fraud is not void, but voidable. The plaintiffs, therefore, having parted with their title, can only avoid the sale by showing that they have a better title than the defendant. The defendant is found in possession, which is a good title until a better one is shown. And it is not enough for the plaintiffs to show a title which is good against another person. See *Butler* v. *Breck*, 7 Met. 164. *Hatch* v. *Bayley*, 12 Cush. 27. *Root* v. *French*, 13 Wend. 570. No analogy exists between this case and the case of a promissory note obtained by fraud.

Merrick, J. It appears from the bill of exceptions to have been satisfactorily proved or admitted that the goods replevied were formerly owned by the plaintiffs, and were sold by them to N. Allen. He afterwards sold and delivered them to the defendant, who claims title thereto only under and by force of that sale to him. The plaintiffs allege that the sale by them to N. Allen was induced, and that he obtained possession of the goods, by fraud and by false and fraudulent pretences. If such was the fact, they may undoubtedly rescind and avoid their contract of sale, and may maintain this action against the defendant, unless he was a purchaser in good faith, for value paid and without notice of the fraud. *Hoffman* v. *Noble*, 6 Met. 68. *Rowley* v. *Bigelow*, 12 Pick. 307.

The plaintiffs, having produced evidence upon the trial tending to show the alleged fraud, asked the court to instruct the jury that if N. Allen obtained the goods from them by fraud and false pretences, the burden of proof was upon the defendant to show that he bought them in good faith and for value paid. But the court declined to accede to this request, and ruled that the burden of proof was on the plaintiff to show by a preponderance of evidence, not only that the goods were obtained by N. Allen by false pretences, but also that the defendant was not an innocent purchaser; and the jury were accordingly instructed to that effect.

This ruling was erroneous. It was sufficient in the first instance for the plaintiffs to prove that they were the owners of the goods, and that their title thereto was never devested by

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any lawful contract binding upon them. They had, therefore, if such were the fact, an undoubted right to reclaim and recover the goods from any person who had not purchased them in good faith and for value paid. This is an exception of which the defendant might avail himself. But, to establish the validity of his title acquired under the sale to N. Allen, it is incumbent on him to show that he was a purchaser in fact, and paid value for the goods. Proof to this effect will establish his right, unless it be further shown by the plaintiffs that, at the time of his purchase, he had knowledge of the fraud.

In respect to promissory notes, it has been repeatedly determined that if they have been fraudulently obtained from the maker, or fraudulently put into circulation, in an action thereon by an indorsee, the burden of proof, after such fraud has been established, is on him to show that he became possessed of them in good faith, by a purchase and payment of value. *Sistermans* v. *Field*, 9 Gray, 331. *Estabrook* v. *Boyle*, 1 Allen, 412. *Tucker* v. *Morrill*, Ib. 528. *Smith* v. *Edgeworth*, 3 Allen, 233. The reason of the rule is applicable with greater force to the case of chattels obtained by fraud; and therefore a purchaser from a fraudulent grantee, who had no just title, ought to be required to prove a fact necessarily in his own knowledge, if such fact occurred, that he paid value for the goods which he purchased. This rule, in its application to chattels, was distinctly recognized and affirmed in the case of *Pringle* v. *Phillips*, 5 Sandf. 157. And so in the cases of *Hoffman* v. *Noble* and *Rowley* v. *Bigelow*, *ubi supra*, the subsequent purchaser was allowed to maintain his title upon showing affirmatively on his part that he paid value for the chattels transferred to him by a fraudulent vendee. The same rule has been observed and practically enforced in reference to real estate. *Somes* v. *Brewer*, 2 Pick. 184. *Green* v. *Tanner*, 8 Met. 411.

The further rulings of the court, to which exception was taken by the plaintiffs, were unobjectionable. The testimony offered as to what was said by D. P. Dodge, and what answers were returned to the plaintiffs to their inquiries made in Tremont Row, was, under the circumstances stated, inadmissible. It

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was an offer of proof, not of what was said by any party to the suit, as to any of the matters involved in its issue, but by strangers who had no connection with or interest in it, and therefore was obviously incompetent. The evidence which was admitted in relation to the conduct of the plaintiffs in reference to the attendance of N. Allen as a witness on the trial was competent, as having some tendency to show an effort on their part to suppress the introduction of material evidence in the case, and thus to obtain an unfair and unjust advantage. Such conduct might well create a doubt whether their allegation as to any fraud committed by Allen was well founded.

The exceptions, therefore, as to the rejection and admissibility of evidence must be overruled; but they are sustained as to the ruling of the court upon the subject of the burden of proof.

Exceptions sustained.

INHABITANTS OF GLOUCESTER *vs.* DANIEL GAFFNEY.

An ancient vote of proprietors of common lands, granting the same, is *prima facie* evidence of title and seisin.

If the demandants in a writ of entry claim title under a vote of proprietors of common lands, passed in 1732, granting all the common land between two designated houses, proof of the position of the houses, and that at the earliest period within the memory of living witnesses there was a lot between them lying open and in common, is sufficient to authorize a jury to find that it is the lot granted by the ancient vote.

WRIT OF ENTRY to recover a piece of upland and flats known as Clay Cove Landing, on Eastern Point, so called, in Gloucester.

At the trial in the superior court, before *Vose*, J., the demandants claimed title under the following vote of the commoners of Gloucester: "At a commoners' meeting, Jan. 4, 1732–3, said meeting voted and gave to the inhabitants of the town of Gloucester forever all the common land at Clay Cove, so called, on the Eastern Point, between Elisha Corney's house and William Nelson's house, on the westerly side of the highway."

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They also introduced evidence showing the position of the two houses referred to; and it further appeared that two lots of land between them were, and for a long time have been, the property of private persons, and it did not appear whether they ever belonged to the commoners or not. There was evidence tending to show that, at the earliest period to which the memory of any of the witnesses extended, in 1790, the land was open and uninclosed from Nelson's to Corney's, excepting one of the lots above referred to.

The tenant requested the court to rule as follows, to wit:

"That, the demandants relying upon the vote claimed to be that of the commoners to prove their title, and there being no evidence of title or ownership by the commoners of the land claimed except the said vote of the commoners, this is not competent or sufficient to prove title in the demandants to the land claimed.

"That the description in said vote is uncertain and conveys no title, without other evidence, to any particular parcel of land, or to any land.

"That said vote is not competent or sufficient to show that the commoners owned any land between the points named in it.

"That it is not competent and sufficient, without other evidence, to prove that they owned the parcel claimed, or any part thereof.

"That in order to prove title to the place claimed, or any part thereof, the demandants must show that it was owned by the commoners at the time of said vote, and, there being no other evidence of that fact than the vote itself, that is not sufficient or competent for the purpose.

"That if it appears that there were at least two other parcels of estate, and those owned by private persons, between the houses named, as there was evidence tending to show, besides the parcel of land claimed, the said vote does not furnish evidence of the ownership of the place claimed in the commoners at the time of their vote, and, without other evidence that the land claimed did then belong to the commoners, the demandants do not prove their title by said vote, and cannot recover."

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The judge declined to rule as above requested, but instructed the jury that the demandants must satisfy them that the whole or a portion of the premises described in their declaration was covered by and included in the commoners' grant; that if they were satisfied that the vote of the commoners granting certain lands to the demandants covered and included the premises claimed, or any part of them, and the demandants went into the occupation and control of the premises claimed, so included in the grant, and under the same, and continued in possession thereof claiming title thereto until the commencement of this suit, such grant and continued possession under it would be sufficient to enable the demandants to maintain this action, and to recover the whole or such part of the premises claimed as was thus covered by the grant; and that, in the absence of all other evidence, it was not necessary for the demandants to prove by any other evidence than that of the grant itself that the commoners had a seisin or possession sufficient to enable them to convey these premises.

The jury returned a verdict for the demandants, for the whole of the demanded premises; and the tenant alleged exceptions.

J. C. Perkins, for the tenant.

W. C. Endicott & B. H. Smith, for the demandants, were not called upon.

Bigelow, C. J. By ancient usage in this commonwealth, as well as under the authority of provincial statutes, (*St.* 4 W. & M. *c.* 12, Anc. Chart. 247, 248, and *St.* 12 Anne, *c.* 2, Anc. Chart. 402,) proprietors of common lands had authority to alien their lands by votes; and such votes, when duly proved by record or otherwise, are deemed to be competent and sufficient proof of title and seisin, and, like deeds duly acknowledged and recorded, in the absence of other evidence, they raise a presumption that the proprietors had sufficient seisin of the premises to enable them to convey, and to vest the legal seisin in the grantee. *Springfield* v. *Miller*, 12 Mass. 415. *Green* v. *Putnam*, 8 Cush. 21. *Ward* v. *Fuller*, 15 Pick. 185. Therefore, by the production of the vote passed by the "commoners of Gloucester," January 4, 1732–3, the demandants established

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a title to the estate or common land therein named and described.

But it is now urged in behalf of the tenant that the court erred in refusing to give the instructions to the jury for which he asked at the trial. It seems to us, however, that his prayers for instructions contained two unfounded assumptions. One was, that the vote of the proprietors offered by the demandants was neither competent nor sufficient evidence that they owned any land comprehended within the designated boundaries. This is clearly erroneous. In the absence of controlling evidence, as has been already said, it was proof of both title and seisin. The other erroneous assumption is, that there was no evidence of title or ownership in the commoners except the vote. But there was evidence introduced by the demandants to show the location of the granted premises, the existence and position of the houses specified in the vote, and of the highway named therein, lying easterly thereof, and also to prove that at the earliest period to which the memory of living witnesses extended — upwards of seventy years — there was a tract of land between the lots occupied by said houses, and thus answering to the description in the vote, which was open, uninclosed and lying in common. Now it is doubtless true that the vote under which the demandants claimed title did not purport in terms to convey all the land lying between the designated boundaries, but only the common land there situate. It was therefore necessary for the demandants, in order to recover, to apply the description in the vote, and to ascertain by evidence the extent and position of the land granted, and to show that it embraced the premises described in the writ. The evidence above adverted to tended to supply this proof. It not only established the position of the two houses named in the vote, thus fixing two exterior lines of the premises granted, but, by proving that the land there situate was not occupied in severalty by any one, but remained open and unfenced, the evidence tended to identify it as land which was lying in common, and in this respect corresponding with the description in the vote. Such evidence, in cases of ancient writings and titles, is not only competent,

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but from the nature of the case necessary, in order to ascertain the subject matter of a grant or conveyance. The practical construction as to extent and boundaries must in such cases be shown by the occupation or mode of use of land. As such, it is a question of fact proper to be submitted to the determination of a jury. *Codman* v. *Winslow*, 10 Mass. 146. In the present case, the instructions under which the case was put to the jury required them to find that the premises described in the writ, or some part of them, were comprehended in the vote of the commoners on which the demandants relied. They were told, in substance, that such evidence was necessary in order to entitle the demandants to a verdict. These instructions were certainly correct and well adapted to the facts in proof. But the instructions for which the tenant asked, so far as they went beyond those which were adopted by the court, were erroneous and calculated to mislead the jury, and were rightly rejected.

Exceptions overruled.

HANNAH B. ATKINSON *vs.* JOHN M. ATKINSON & others.

An assignment of shares in a corporation needs not to be under seal.

If a guardian who holds shares in a corporation, which were issued to him in his official capacity, improperly assigns them to secure a private creditor, who takes them with knowledge of the facts, the guardian's successor in office may maintain a bill in equity to obtain a transfer thereof to himself. But if he assigns other shares, which belong to his ward, but which were issued to him without expressing his official capacity, to one who takes them for value, without notice, his successor cannot maintain a bill in equity to obtain a transfer thereof to himself.

The allowance by a judge of probate of a guardian's account, in which the guardian charged himself with the appraised value of certain shares in a corporation, belonging to his ward, and the recovery of judgment upon his bond for the amount of moneys remaining in his hands at the time of his ceasing to be guardian, are no bar to a bill in equity by his successor to obtain a transfer of the shares, if their value was not included in the judgment: although in a specification of particulars of the plaintiff's demand in the action in which the judgment was recovered, the balance found due by the probate account was claimed as cash in his hands.

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BILL IN EQUITY, originally filed by the plaintiff as guardian of Annie N. Atkinson, William B. Atkinson, Lucy E. Atkinson and Harriet A. Atkinson, minors, against John M. Atkinson and the West Amesbury Manufacturing Company, a corporation.

The original bill alleged that John M. Atkinson was formerly the guardian of said minors, and was discharged from that trust on the 21st of October 1856; that the plaintiff was thereupon appointed as his successor, and demanded of him the money, goods and certificates of stock belonging to them; that he then held about $1000 in money, and one certificate of ten shares, and two other certificates of one share each, in the West Amesbury Manufacturing Company, of the par value of fifty dollars each, belonging to them; that he has refused to deliver up the same; that an action had been commenced upon his bond as guardian, which was in the penal sum of $1000, to recover the said money; that the West Amesbury Manufacturing Company refuse to pay over the dividends which have accrued on said shares without the presentment of the certificates by the rightful guardian, whereby a loss is suffered by the plaintiff by having them lie useless in the hands of the corporation; that the plaintiff is remediless at law and cannot obtain the certificates, they being secreted or withheld, so that they cannot be replevied. The bill also prayed for answers by the defendants under oath.

The corporation filed an answer, setting forth that on the 17th of February 1853 they issued a certificate of ten shares of their stock to John M. Atkinson, as guardian of said minors; that on the 14th of June 1854 they issued a certificate of one share to said Atkinson, and on the 20th of October 1855 another certificate of one share to him, without any designation of him as guardian; that the two last named shares were issued by them in good faith, in the form desired by him; that these shares still remain standing upon their books, as above stated; that Joseph Atkinson claims to be the owner of the ten shares, and has presented the certificate thereof to them, assigned to him by John M. Atkinson, and has demanded that the corporation should

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issue a new certificate thereof to him; that George W. Jackman in like manner claims to be the owner of the other two shares, and has demanded certificates thereof; that the plaintiff has also demanded that the corporation should issue new certificates of all of said shares to her as guardian, but did not produce the old certificates and tender them for cancellation, in compliance with an article of their by-laws requiring such production and tender to be made, and providing that certificates of shares may be transferred by an instrument in writing, recorded by the clerk in a book to be kept for that purpose; and that it is entirely immaterial to the corporation to whom they issue the certificates or pay the dividends, provided it is to the party or parties legally entitled thereto.

The plaintiff thereupon filed supplemental bills, making Joseph Atkinson and George W. Jackman parties to the suit.

The answer of John M. Atkinson set forth that the certificates referred to were duly inventoried by him as the property of his wards; that he rendered accounts of his guardianship, which were duly allowed in the probate court, in which he was charged with the value of the shares; that the judge of probate, for the benefit and at the request of the plaintiff, commenced an action upon his bond, in which it was sought to recover the balance due upon this defendant's last account, made as aforesaid; that judgment was recovered in said action for an amount exceeding the penalty of the bond, and including the value of said shares, which judgment is still outstanding; and that after the commencement of said action, and to secure the sureties upon his bond, he conveyed the shares to persons who have since been made parties to this suit.

Joseph Atkinson filed an answer, setting forth substantially the same facts stated in the answer of John M. Atkinson. The answer of George W. Jackman set forth that he purchased the two shares assigned to him in good faith, for a valuable consideration, and without notice of any trust attaching to the same.

At the hearing in this court, before *Metcalf*, J., the plaintiff put in evidence the inventory filed in the probate court by John M. Atkinson, of the property of each of said minors, including

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in each one undivided fourth part of the shares in question; his four several accounts, (a separate account being rendered for each of his wards,) in each of which he charged himself with the whole amount of the personal estate, as by the inventory, which accounts were allowed in the probate court in January 1856; and the record of the judgment, with the pleadings and the report of an auditor, in the action commenced in her behalf by the judge of probate, as set forth in the answer of John M. Atkinson. The declaration in this action alleged that said John M. Atkinson did not settle his accounts at the expiration of his trust, or pay over and deliver all the estate and effects remaining in his hands, and claimed the penalty of the bond. A specification of "the particulars of the demand in this action," which was filed therein, contained simply items of "Cash as per inventory and last accounts filed" and interest thereon. The auditor to whom the case was referred made a report, containing a statement of the account of John M. Atkinson, showing that besides the twelve shares in question there was due from him, in June 1861, the sum of $1149.39. The record of the judgment, after reciting that the auditor made a report, which was on file, stated that "the parties appeared, and by their consent judgment was rendered for the plaintiff against the said John M. Atkinson for the sum of $1132.50 damages;" and that, the surety who was made a defendant in the action having died, a summons issued to his executors, one of whom afterwards made default, and judgment was accordingly rendered against him for the sum of $1155.83 damages. The competency of the auditor's report was objected to, but admitted *de bene esse*. It was admitted that the two single shares were issued as stock dividends upon the other ten shares.

The case was reserved for the determination of the whole court.

C. Lamson, for the plaintiff.

J. W. Perry, for the West Amesbury Manufacturing Company

S. B. Ives, Jr., for the other defendants.

Chapman, J. The object of the plaintiff's bill is to obtain a transfer of certain shares of the stock of the West Amesbury

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Manufacturing Company, and payment of the dividends which have been declared thereon.

The defendant John M. Atkinson was guardian of four minor children, who are named in the bill, and as such guardian received, among other property, a certificate of ten shares of said stock on or about the 17th of February 1853, which expressed that he held it as guardian of said minors. In 1854 he received a certificate for one share, and in 1855 another certificate for one share. The last two certificates were issued as stock dividends upon the other ten shares, and did not express that he held them as guardian. On the 21st of October 1856 he was discharged from his guardianship, and the plaintiff was appointed as his successor. The defendant Joseph Atkinson was one of his sureties on his probate bond, and for the purpose of indemnifying him John M. delivered to him the certificate of ten shares, on the back of which he made an assignment of the shares to him. Joseph received it with full knowledge of all the facts. The other two shares were sold by John M. to the defendant Jackman, who purchased them in good faith, without notice of the guardianship, and for value. It is objected by the plaintiff that the assignment of the certificates to Jackman was void because it was not under seal. But by the provisions of St. 1846, *c.* 45, reënacted in Gen. Sts. *c.* 60, § 13, an instrument in writing is sufficient, without a seal. As the shares stood in the name of John M., without stating that he held them as guardian, Jackman is entitled to hold them, and the bill must be dismissed as to him, with costs.

The defendant John M. Atkinson sets up in bar of this suit a judgment which has been recovered against him on his probate bond. But the judgment was not rendered for the value of the shares in question in this suit, and therefore cannot be a bar to the suit.

As to the ten shares, of which the certificate was assigned to Joseph Atkinson, no authority had been obtained by John M. to transfer them, in conformity with Rev. Sts. *c.* 79, § 21, and the transfer of them was made without a license. But the certificate gave notice on its face, both to Joseph and the corporation,

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that the shares were the property of the minors; and, upon the appointment of the plaintiff as guardian, she became entitled to have them transferred to her, and to the dividends which might be made on them. She was not a purchaser, within the meaning of the by-law set forth in the answer, and she could not present the certificate to be cancelled, because it was in the hands of Joseph, to whom John M. had assigned it wrongfully She is entitled to a decree against these parties for a transfer of these shares to her as guardian, and for the dividends which have accrued thereon, with costs.

The corporation does not appear to be in fault in respect to the two shares assigned to Jackman, and the plaintiff is entitled to a decree for their value against John M. Atkinson only.

JARED S. HOWE *vs.* BAILEY BARTLETT.

If, after an attachment of mortgaged goods, the mortgagor goes into insolvency, it is the duty of the attaching officer to deliver them to the mortgagee, and not to the assignee of the mortgagor.

TORT against a deputy sheriff for the conversion of goods, which the plaintiff claimed under a mortgage. Upon agreed facts, which sufficiently appear in the opinion, judgment was rendered in the superior court for the defendant; and the plaintiff appealed to this court.

D. Saunders, Jr., for the plaintiff.

D. H. Mason, (*N. G. White* with him,) for the defendant.

CHAPMAN, J. The validity of the plaintiff's mortgage and of the defendant's attachments is admitted. But it appears that after the attachments the mortgagor, Dodge, went into insolvency. The defendant, being appointed messenger, thereupon claimed to hold the property as such, and as soon as an assignee was appointed he delivered over the property to him. The assignee took it, and withholds it from the plaintiff.

This disposition of the property was illegal. The defendant

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had taken it by attachment, under the statute; and the statute authorized him to take it only by attachment upon mesne process. Its provisions did not extend even to a seizure on execution. *Lyon* v. *Coburn*, 1 Cush. 278. *Lamb* v. *Johnson*, 10 Cush. 126.

The *St.* of 1838, *c.* 163, § 5, gave to assignees a right to redeem mortgaged property, but not to take it from the possession of a mortgagee without redemption. In respect to property not mortgaged, it is the duty of an attaching officer to deliver it to a messenger. *Penniman* v. *Freeman*, 3 Gray, 245. But to hold that this duty extends to property taken by attachment from the possession of a mortgagee would be inconsistent with his rights; for it is a delivery of the property into the hands of one who has no right of possession as against the mortgagee. It is settled that the mortgagee is entitled to possession as against the assignee. *Briggs* v. *Parkman*, 2 Met. 258.

The dissolution of the attachment restored to the plaintiff an immediate right of possession; and the delivery of the property to the assignee instead of the plaintiff was a conversion.

But as the assignee is the person entitled to the surplus, the plaintiff can recover only the amount due on his mortgage, with interest.

EDWIN BOWLEY & another *vs.* ROBERT G. WALKER & others.

Establishing an alteration in a way, upon a petition praying that it may be widened and straightened, is in law a discontinuance of those portions of the way which do not come within the newly assigned limits; and no special order of discontinuance is necessary.

An open, peaceable, adverse and exclusive possession of land which has been discontinued as a highway, under claim of title, is sufficient to support an action for trespass, against all persons who have not a better title.

TORT for breaking and entering the plaintiffs' close, and removing a large quantity of gravel. The defendants justified their acts on the ground that they were the selectmen of Haverhill, and that they removed the gravel, which was within the

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limits of a highway, for the purpose of repairing the highways of that town.

At the trial in the superior court, before *Vose*, J., it appeared that the close described was formerly included within the limits of a highway, and that in 1854, upon a petition praying that the highway might be widened and straightened, the county commissioners assigned new limits for the same, as stated in the opinion, which did not include the close described; and that, some months prior to the alleged trespasses, the plaintiffs fenced in the premises, claiming title thereto under several deeds, which were introduced in evidence, and respecting which questions arose which are not now material, and were in possession thereof, thus claiming title, at the time of the acts complained of. These facts not being in dispute, the judge instructed the jury that the plaintiffs were entitled to recover, and the jury returned a verdict accordingly. The defendants alleged exceptions.

J. C. Perkins, for the defendants.

D. Saunders, Jr. & J. W. Perry, for the plaintiffs.

CHAPMAN, J. The straightening of a crooked highway must be regarded as an alteration of it, and its operation is to discontinue such parts as are left without the limits of the way as straightened. The way in this case was so altered as to be "not less than fifty feet wide, southerly of the lines described," which lines were constituted, by the order of the county commissioners, the northerly boundary of the way. This description cannot be regarded as appropriating more than fifty feet to the highway, and that part of the old way which lay south of it was discontinued. The plaintiffs then fenced in and occupied the land lying south of this straightened way, claiming title to it. This occupation constituted a good possessory title against all persons who had not a better title. The defendants, having no rights beyond the limits of the highway, removed the fence and took gravel from the inclosed land. This was clearly a trespass; and the other questions raised are, in this view of the case, immaterial. *Exceptions overruled.*

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JOHN W. HUTCHINSON *vs.* TOBIAS F. GURLEY.

The objection of a variance between the allegations in a petition for a review and the proof at the hearing in the superior court cannot be taken for the first time at the argument in this court upon exceptions.

A review of a judgment rendered by a justice of the peace may be granted on the ground that the party against whom it was rendered intended to appeal and thought he had appealed

PETITION to the superior court for a review of a judgment rendered by a justice of the peace, setting forth, as the reason, that the petitioner claimed an appeal, and that there was an appeal from the judgment.

At the hearing, before *Ames*, J., the petitioner put in evidence a copy of the record of the judgment rendered by the magistrate, which did not show that any appeal was claimed, or that there was any appeal. The respondent asked the judge to rule that an appeal or claim of an appeal could only be proved by the record. The petitioner then claimed as a ground for review that he intended to appeal and thought he had appealed; and the judge, being satisfied that this was so, and that he had only failed to have his appeal entered in consequence of a misunderstanding and mistake on his part, ordered a review. The respondent alleged exceptions.

J. P. Jones, for the respondent.

W. Howland, for the petitioner, was not called upon.

BIGELOW, C. J. No objection was taken at the hearing of this petition that the evidence offered as a ground for granting a review did not sustain the allegation in the petition. If such objection had been then taken, the petitioner might have had leave to amend. The respondent, by not raising the question of variance at the proper time, must be held to have waived it, because his omission deprived the petitioner of an opportunity to make the necessary amendment.

The evidence offered in support of the prayer for review did not vary or contradict the record. On the contrary, the petitioner admitted that the record was correct, but that through some mistake or inadvertence he omitted to claim an appeal.

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This was the ground on which the review was granted. But if the petitioner had sought to show that the record was erroneous, we think such evidence would have been competent on the question of granting a writ of review. *Brewer* v. *Holmes*, 1 Met. 288. *Exceptions overruled.*

ENOCH WOOD & others *vs.* GEORGE FOSTER.

The declaration of a person made upon land, while he was in possession thereof under an undisputed claim of title, that his line extended to a certain boundary which he pointed out at the time, is admissible in evidence, after his decease, in favor of those who claim under him, on the trial of a question arising subsequently concerning the boundary line of the same tract of land.

TORT for breaking and entering the plaintiffs' close.

At the trial in the superior court, before *Brigham*, J., it appeared that the plaintiffs and the defendant were the owners of adjoining tracts of woodland, and the plaintiffs contended that the boundary line between them was marked by an old stone wall; but the defendant contended and introduced evidence tending to show that the wall had been put there by mistake, and that the true boundary was a straight line from a stake and stones, about three rods to the west of the southerly end of the wall, to the northerly end of it. The land between the wall and a line thus drawn was the subject of dispute. The defendant claimed title under his father, who died in 1856 or 1857, aged eighty-two years; and he, and another witness in his behalf, were called and offered to testify that his father, while in possession of the land and upon the same, exercising acts of ownership, pointed out the western boundary of his land as a line drawn from a stake and stones to a stone wall. The time fixed by one of the witnesses for the making of this statement was in 1842. The judge rejected the evidence.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

E W. Kimball, for the defendant.

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A. A. Abbott, for the plaintiff.

CHAPMAN, J. In *Daggett* v. *Shaw*, 5 Met. 223, it is said that the declarations of ancient persons, who are deceased at the time of the trial, made while in possession of land owned by them, pointing out their boundaries, on the land itself, are admissible in evidence, when nothing appears to show that they were interested to misrepresent in thus pointing out their boundaries; and it need not appear affirmatively that the declarations were made in restriction of or against their own rights. This doctrine is recognized in *Bartlett* v. *Emerson*, 7 Gray, 174, and *Ware* v. *Brookhouse*, Ib. 454. It applies to the present case, because it appears that the defendant's father was on the tract when he pointed out the boundary, and it does not appear that any controversy had then arisen respecting his title. Being in actual occupation of the land, under claim of title, he pointed out the limits of his claim. The evidence should have been admitted. *Exceptions sustained.*

MARY G. BUTMAN *vs.* JOHN A. BACON.

Proof that a depositor in a savings bank left her bank book with her mother, for the purpose of enabling the latter to draw out money upon special orders, from time to time, and that moneys were at different times deposited and withdrawn by the latter for the former, is not sufficient to authorize a jury to infer an agency on the part of the latter to receive payment of other money due to the former.

CONTRACT to recover the sum of $100 money lent. The defence was payment.

At the trial in the superior court, before *Lord*, J., the plaintiff testified that, being about to remove from Boxford, where she formerly lived, she left with her mother her bank book of deposits in the Haverhill Savings Bank, so that, if she should want money, she might send an order to her mother to draw it for her; that she afterwards sent money to her mother to deposit; that the defendant, who was her brother, applied to

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her by letter for a loan of $150, and that she sent an order for that amount to her mother; and it appeared that this amount was drawn from her funds in the bank, and afterwards a deposit to her credit of $50 was made. The defendant admitted that he received the $150 from the savings bank on the order, and his counsel asked him, in his examination, what he did with the money. Objection being made to this inquiry, the judge asked the object of it; and the defendant's counsel replied that it was to prove that $50 of the money was immediately handed to the mother, and that the $100 actually borrowed was paid to the mother about a year afterwards. A witness was then called who testified that, when the plaintiff left her bank book with her mother, she gave her "instructions about her business; the instructions were, she wanted to leave the bank book with her, and have her do her business, so that when she wanted money she could get it by sending orders to her." The judge ruled that the evidence of the payment of the $100 to the plaintiff's mother was inadmissible, and a verdict was returned for the plaintiff. The defendant alleged exceptions.

H. Carter, for the defendant.

W. C. Endicott, for the plaintiff, was not called upon.

By the Court. The evidence offered contains no express words by which the plaintiff constituted her mother her agent to receive payment of this debt. Nor is the power to receive it implied by the agency which the evidence tended to prove; for that agency related to other matters, and was not general, but limited to those matters. *Exceptions overruled.*

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Fayette Mutual Fire Insurance Company *vs.* Granville Fuller & another.

A vote by the directors of a mutual insurance company, cancelling all outstanding policies, with a provision that the cancellation shall take effect on a certain day, does not take away their authority after that day to lay a necessary assessment upon the deposit notes.

If no mode of calling meetings of the directors of a mutual insurance company is prescribed in the by-laws, except that the secretary shall notify all such meetings, and if the by-laws do not require that the object of such meetings shall be stated in the notices, an assessment upon deposit notes may be laid at a meeting notified by the secretary, by order of the president, although it is not attended by the president, and although the object of the meeting was not stated in the notices.

A statement of the condition of a mutual insurance company, prepared upon making an assessment, which shows all the separate items of liabilities for which the assessment is made, is sufficient, under Gen. Sts. *c.* 58, § 54, although in summing up the aggregate of them other items for estimated expenses, return premiums and losses in collecting are included.

If the by-laws of a mutual insurance company do not provide that the deposit notes shall be deemed to be absolute funds of the company, an assessment may be laid before the collection of them has been made or ordered.

Payment of an assessment upon the deposit notes of a mutual insurance company cannot be resisted on the ground of the omission to assess certain notes liable to assessment, if it appears that all the notes which were in force during the time in question were assessed except a very small number, which had been adjusted and cancelled by officers of the company before making the assessment, and which were of so small an amount as not materially to increase the assessment upon the remainder.

If a mutual insurance company have issued policies for terms varying from less than one year to five years, and in making an assessment upon the deposit notes have reduced those which were given upon policies for more than one year to "one year notes," by assuming as the basis of such assessment such a proportion of the amount expressed upon their face as is found by an auditor, whose report is taken as an agreed statement of facts, to be "fair and reasonable, and as near to perfect equality as can be approximated in such calculations," this court will not, upon a hearing upon the agreed statement of facts, declare the assessment void, as being unequal.

If the by-laws of a mutual insurance company provide that policies may be surrendered at any time to be cancelled, and that the insured shall receive the return premium in accordance with a certain table, and, after an injunction has been laid upon the company, the directors, under the authority of this court, have duly cancelled all the outstanding policies, the return premiums due to the policy holders are just claims against the company, within the meaning of Gen. Sts. *c.* 58, § 48, and may be included among the items of liability, in making an assessment upon the deposit notes.

Contract to recover the amount of assessments laid by a mutual insurance company upon deposit notes given by a member upon obtaining insurances. The case was referred to J. W. Perry, as auditor, who reported the following facts, which the parties agreed to take as an agreed statement of facts:

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At the annual meeting of the company in January 1861, twenty directors were chosen. On the 22d of June 1861, the company were enjoined by this court from doing any further business, except that they were authorized and empowered to choose officers, and do all necessary acts to continue their corporate existence, until the concerns thereof should be fully and finally closed, and also to lay all such assessments, according to the provisions of law, as might be necessary to pay the liabilities of the company. On the 12th of November 1861, the above injunction was so far modified and dissolved that the directors were authorized and empowered, under the direction and with the written assent of the receiver, to cancel any and all of the outstanding policies, according to the 9th article of the by-laws, and upon the terms therein expressed. At a meeting of the directors held on the 20th of November 1861, it was voted to "cancel all the outstanding policies of the Fayette Mutual Fire Insurance Company . . . . . said cancellation to take effect from the 26th day of November 1861," according to the foregoing decree. It was also voted "that a committee of three be appointed by the president to value the outstanding policies and report the whole liability of the company, and also a plan for an assessment." The receiver assented to the cancellation of the policies; and the committee was appointed. On the 22d of November 1861, a written notice, signed by the secretary of the company and the receiver, was sent to all the holders of policies, informing them of the above cancellation thereof.

A special meeting of the directors was called for the 11th of December 1861, by order of the president, and the secretary sent a written notice thereof to each of the directors. Seven of the directors attended this meeting, but the president was absent. The notices did not state the object of the meeting, and there was no by-law of the company requiring that this should be done. At this meeting it was voted to raise $12,000, by assessment, to pay losses, bad debts, return premiums, and expenses of settling up the affairs of the company. At the same meeting, a statement of the condition of the company was made and signed by the directors who were present, in

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which the items of the losses and liabilities were stated in detail, with the amount of each carried out in a column at the end of the line. Immediately underneath these items were the following:

Current expenses from August 12, 1859, to December 12, 1861, ...	$3723.60
Expenses and services of receiver, estimated at .	800.00
Return premiums, ...	1226.15
Other expenses of closing up the affairs of the company, and estimated deficiences not otherwise provided for, ...	1170.00

All of these items were added up together, and amounted to $12,917.60, from which sum a deduction was made of the premiums received, amounting to $4354.28, leaving a balance of $8563.32, to which was added $3425.32, being forty per cent., for bad debts and expenses of collecting, giving a result of $11,988.64.

The policies of the company were issued for one, two, three, four and five years; and some for less than one year. In making the assessment, the notes and premiums were all reduced to one year notes, except those given for policies issued for less than one year, which were called one year. This reduction was made by calling yearly deposits at their full amount; the two year deposits at three fourths of their amount; the three year deposits at one half of their amount; the four year deposits at three eighths of their amount; and the five year deposits at one third of their amount. This reduction was necessary, because the premiums and deposits for terms longer than one year were proportionally larger. None of the witnesses examined knew the proportions established by other companies for two and four year policies, but the proportions established by other mutual companies for three and five year policies were one half and one third respectively, and the uniform rule of the plaintiffs was to fix the proportion as above upon notes for the above mentioned lengths of time, and the auditor found as a fact that such proportion is fair and reasonable, and as near to perfect equality as can be approximated in such calculations; that the ratio or rate

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for each month was accurately obtained; that the computations were made with substantial accuracy; that the sums raised were necessary and proper to be raised, and the rate or ratio was equally applied to all the deposits and premiums liable to be assessed, during the months when computations were made; and that in fact all the assessments were just and equal, and approximated as near to equality as is possible, upon all the members liable to assessment.

The auditor also found that there was a large number of notes in the hands of the company which did not enter into the computation; but of these only three which were not assessed were in force during the term of the defendants' policies. The first of these was cancelled in December 1860; the second was a small note given for a policy, on which there was a loss in October 1860, and the secretary testified that he settled the loss by paying a certain sum and agreeing to release the holder of the policy from all liability upon his deposit; and the third was cancelled in December 1860. The auditor found that every premium and deposit liable to assessment was assessed in a just and equal manner; that, if any were omitted, it was through mistake and accident; that the omissions, if any, were of so trifling an amount that the liability of the defendants was not materially increased; that the notes in suit were signed by the defendants; that the current expenses and the estimated expenses of closing up the company were reasonable; that the addition of forty per cent. is according to the usual practice of mutual insurance companies, and not too large; and that the amount stated for return premiums was accurately assessed.

The 9th article of the by-laws was as follows: "This policy may be surrendered at any time to be cancelled, and the insured shall receive the return premium in accordance with the table of short rates, and the secretary may cancel this policy when, in the opinion of the president and secretary, there is sufficient cause therefor, giving three days' notice to the assured." Other material portions of the by-laws are copied in the opinion.

Upon these facts judgment was rendered for the plaintiffs in the superior court, and the defendants appealed to this court.

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J. H. Butler, for the defendants. The vote of December 11, 1861, was void, because the policies of the persons assuming to act as directors had been cancelled, and they were no longer eligible as directors. Gen. Sts. *c.* 58, § 43. The meeting was not called by the directors. The absolute funds of the company had not been exhausted. The collection of the notes should have been ordered before laying an assessment. Gen. Sts. *c.* 58, §§ 48, 54. *Long Pond Ins. Co.* v. *Houghton*, 6 Gray, 77. *Appleton Ins. Co.* v. *Jesser*, 5 Allen, 446. The assessment was not laid by the president and directors. The amount subject to assessment was not separately shown, in the statement of the condition of the company. Gen. Sts. *c.* 58, § 54. Notes were intentionally omitted, which should have been assessed. *Marblehead Ins. Co.* v. *Hayward*, 3 Gray, 208. Return premiums are not just claims against a mutual insurance company, within the meaning of Gen. Sts. *c.* 58, §§ 48, 51.

D. Saunders, Jr. & G. E. Hood, for the plaintiffs, cited *People's Ins. Co.* v. *Allen*, 10 Gray, 297; *Jones* v. *Sisson*, 6 Gray, 288; *Marblehead Ins. Co.* v. *Underwood*, 3 Gray, 210; *New England Ins. Co.* v. *Belknap*, 9 Cush. 140; *Swamscott Machine Co.* v. *Partridge*, 5 Fost. (N. H.) 369; *New Hampshire Ins. Co.* v. *Rand*, 4 Fost. (N. H.) 428.

Dewey, J. This case comes before us upon the report of an auditor, who, after a full examination of the details of the manner of making the assessment, and the principles by which the same was regulated, finds "that the ratio for each month was accurately obtained, that the computations were made with substantial accuracy, that the sums raised were necessary and proper to be raised, and that all the assessments were just and equal, and approximated as near to equality as is possible, upon all the members liable to assessment." This report is to be adopted by us, unless the facts stated in reference to the assessment show some irregularity in the proceedings fatal to its validity. Upon the part of the defendants, various reasons are assigned in avoidance of it.

1. It is contended that there were no directors competent to make this assessment. It is said that this result follows from

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the vote of the directors cancelling all the outstanding policies on the 26th of November 1861, whereby the directors ceased to retain their offices, and the company was in fact disorganized. But we think this position untenable. The directors had been legally chosen, and continued in office and were competent to act in making assessments. In the order of this court of June 22d 1861, enjoining the corporation from the further prosecution of their ordinary business, it was ordered that the corporation be empowered "to do all necessary acts to continue their corporate existence, until the concerns thereof shall be fully and finally closed, and also to lay all such assessments, according to the provisions of law, as may be necessary to pay the liabilities of said company." The only practical effect of the vote to cancel the policies of the members of the company on the 26th of November 1861 was to fix a date upon which to calculate the liability of the company for losses and return premiums.

2. It is said that the special meeting of the directors, at which the assessment was laid, was not duly called, because it was called by the president only, and not by the president and directors. No mode of calling such meetings is prescribed by the by-laws of the company. By art. 5th it is provided that the president and directors "shall meet at the company's office on the first Monday of each month, and at such other times as they may deem necessary. Five members shall constitute a quorum." In the absence of any express provision in the by-laws as to calling such meetings, we are of opinion that the notice given by the secretary, by direction of the president, was sufficient, and that, upon the assembling of a sufficient number of the directors to constitute a quorum, they might proceed to act upon the subject of ordering an assessment upon the members of the company to pay losses, and other liabilities that constituted proper subjects of assessment. *Sargent* v. *Webster*, 13 Met. 497. It may be further added that by the 6th by-law the secretary is to "notify all meetings of the directors," and such was the notice here given. This meeting of the directors, when assembled, was competent to make the assessment, although the president was absent.

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3. It is said that this assessment is void by reason of its omission to comply with the provisions of Gen. Sts. *c.* 58, § 54, requiring a statement showing the amount of cash on hand, deposit notes and liabilities subject to assessment, to be made by the directors, signed by them and duly recorded. In the opinion of the court, the facts stated show a sufficient compliance with the statute in that respect.

4. It is urged that these deposit notes should have been treated as absolute funds, to be applied to the payment of losses and expenses, before the assessment could lawfully be made. The cases of *Long Pond Ins. Co.* v. *Houghton*, 6 Gray, 77, and *Appleton Ins. Co.* v. *Jesser*, 5 Allen, 446, which are relied upon by the defendants, were unlike the present. No provision exists in the by-laws of this company declaring all premium and deposit notes to be absolute funds of the company, and as such to be first applied to the payment of losses and expenses. By art. 8 of the by-laws, "the directors may make such assessments as may be necessary." Nor was there any violation of Gen. Sts. *c.* 58, § 48, in making the assessment. The case sufficiently shows that the just claims against this company exceeded the funds in their hands to be applied to discharge the same.

5. Upon the finding of the auditor, and the facts stated by him, no objection exists as to the omission of any deposit notes not included in the aggregate which was made the basis of the assessment.

6. In adjusting assessments upon deposit notes and liabilities arising under policies issued at different times, and to continue for different periods, some being for one year, and others varying from two to five years, a great practical difficulty arises in making the assessments exactly proportional and equal. All that has been required is a reasonable approximation to such a result. In the present case the auditor finds as a fact that the proportion adopted in adjusting this assessment to the different periods for which the policies were held "was fair and reasonable, and is as near to perfect equality as can be approximated in such calculations." No legal principle seems to have been violated in this respect, and we see no reason for avoiding the

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assessment for any error in the mode of adjusting the proportions as between the various policies, in reference to the period for which they were issued. *Marblehead Ins. Co.* v. *Underwood*, 3 Gray, 210. *Jones* v. *Sisson*, 6 Gray, 288.

7. It is further contended that this assessment is void, because it included the sum of $1226.15 for indebtedness for return premiums. Ordinarily assessments have been made to cover losses and expenses. The provisions of Gen. Sts. *c.* 58, § 48, are: "When the just claims against a mutual fire insurance company exceed the funds, its directors shall assess such sums as may be necessary upon the members, in proportion to their premium and deposit." The question then arises, whether the claims of the members of the company whose policies had been cancelled for a return premium were not, under the facts of the present case, to be considered as just claims, and as such to be included in the liabilities of the company for which an assessment might be made.

Art. 9 of the by-laws of the company clearly authorizes a cancellation, and imposes upon the company the duty of paying to the assured in such case the return premium. Each member in taking his policy took it subject to the claims of the other policy holders to receive a return premium. In this state of things, upon the application of the insurance commissioners, this court enjoined the company from proceeding further in their ordinary business; but the directors were authorized and empowered, with the written assent of the receiver, to cancel any and all the outstanding policies issued by the company, according to the 9th article of the by-laws, and upon the terms therein expressed, and also to lay all such assessments as might be necessary to pay the liabilities of said company. The form of cancellation adopted here was by a vote of the directors to cancel all the outstanding policies, and the appointment of a committee by the president to value them. The receiver duly assented to the cancellation in writing, and the secretary and the receiver gave due notice of the fact of such cancellation to the holders of policies. Under these circumstances, the corporation became liable to the members of the company whose

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policies had been cancelled for a return premium, calculated upon a proper basis, and the amount thus due was properly made one of the items of the assessment.

The result is, therefore, that the objections to the assessment are not sustained. *Judgment for the plaintiffs*

IRA STORY *vs.* DAVID BUFFUM.

A lien on a ship will be dissolved if the person claiming it knows that large credits exist, which exceed a certain sum, and knows very nearly though not exactly their amount, but gives no further account of them, in his statement, than that such credits exist, to an amount which is not known and cannot be computed by him; or if in his statement he says that the owner of the vessel is unknown, when he has been informed and believes that she was owned by the person who in fact owned her.

PETITION for the enforcement of a lien upon a vessel.

At the trial in the superior court, before *Allen*, C. J., it appeared that the vessel was originally owned by David Buffum and Dennis Holland, and that in June 1861 Buffum became the sole owner. The petitioner testified to the execution of a written contract between himself and Holland, dated December 21, 1860, under which the services were performed and materials furnished for which the lien was claimed, and also to the performance and value of the services and materials, amounting in all to $4363.39.

"Upon cross-examination, he stated that as the work went on Buffum let him have money, amounting to $500 and more, for which he gave demand notes, with the understanding that the amounts so furnished should be considered a loan in case Buffum did not become the owner of the vessel, but that in case he did the same would be considered as part payment for the work on the vessel; that on the 7th of June Buffum paid him $500, for which he gave a receipt; that Buffum also paid some of the bills, and told him that he had assumed payment of more; that the petitioner had heard and believed, when the work was commenced, so far as he could believe anything, that

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Buffum and Holland owned the vessel together; that they had both told him so; that before the time of filing the certificate he had heard that Buffum had become sole owner, and at the time of filing it believed it; that he could not say that either party told him so; that he knew that Buffum and Holland had had difficulty, and that some settlement had been come to, and that in some way the title of the vessel had been transferred to Buffum, although he had no actual knowledge of the execution of any papers; that at the same time, viz: when the certificate was signed, he knew that Buffum had paid this $500, and that he had advanced this other sum of $500, and that he had paid, or so far assumed as to discharge him (Story) from liability, certain bills, amounting, with said items of cash, to a sum exceeding $3200, and not exceeding $3500; that he knew the amount so paid was within those limits, but did not know the exact amount, although he had the means of knowing by inquiring of Buffum.

"He further testified that, after completing the job and just before filing the certificate, he called on Buffum to know what he was going to do about a settlement; that he asked Buffum if he intended to pay the bills; that Buffum told him he would pay the bills, but could not do so that day; that he told him, if he would settle then he would settle at a certain rate, otherwise he should demand the amount claimed under his contract in the petition; that Buffum said nothing; that at that time he asked Buffum about the bills which had been passed over to him, which, together with the money and bankable paper furnished, it is now known amounted to $3208.69, and that Buffum told him he had paid or assumed that amount; that he told Buffum he should allow him all that, but he wished to know what he would do about the balance; and that Buffum gave him no satisfactory answer."

The certificate filed in the city clerk's office was thereupon offered in evidence. It showed the whole amount earned by the petitioner to be $4363.39, as above stated, of which the sum of $4250 was claimed as due for services under the contract, and the residue for extra work and materials, and contained the following additional statement: "There should be allowed

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to the credit of the above account a large amount, which cannot be computed by the subscriber, for which David Buffum has paid or made himself responsible; the amount is not known to the subscriber."

The chief justice ruled that upon the evidence this certificate was insufficient and invalid, and directed a verdict for the respondent, which was accordingly rendered; and reported the case for the determination of this court.

S. H. Phillips, for the petitioner.

S. B. Ives, Jr., for the respondent.

METCALF, J. By the Gen. Sts. *c.* 151, § 13, this petitioner was required, in order to save his lien on the vessel, to file, in the office of the city clerk of Salem, a sworn statement, subscribed by him, "giving a just and true account of the demands claimed to be due to him, with all just credits," and also "the name of the owner of the vessel, if known." But he has failed to comply with either of these requisitions. As to the amount of his claim and the just credits, the statement subscribed and filed by him was this: "Due for services on said vessel, $4250. There should be allowed to the credit of the above account a large amount, which cannot be computed by the subscriber, for which David Buffum has paid or made himself responsible; the amount is not known to the subscriber." Yet it appears from his own testimony, given at the trial, that he knew, when he subscribed the foregoing statement, that Buffum had paid more than $3200; and it appeared from other testimony that the exact sum that Buffum had paid was $3208.69. It is impossible, therefore, to regard the statement which the petitioner filed as a statement of all just credits. He was bound to give credit for $3200 at least.

We are also of opinion that the owner of the vessel was known to the petitioner, within the meaning of the statute requisition that he shall state the owner's name, "if known." His statement was filed in the office of the city clerk on the 22d of July 1861. And he testified, on the trial, that he had heard and believed, when the work on the vessel was begun by him, that Buffum and Holland owned the vessel together; that they

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both had told him so; that, before he filed his statement, he had heard that Buffum had become the sole owner, and believed that it was so when he filed his statement; that he knew that in some way the vessel had been transferred to Buffum, though he had no actual knowledge of the execution of any papers. And it is admitted by the petitioner's counsel that, when he filed his statement, Buffum was in fact the sole owner of the vessel. The statute word "known" cannot be held to require further knowledge of the owner's name than that which the petitioner had. Absolute knowledge can be had of very few things.

As these two defects in the petitioner's statement are fatal to his claim, we have not considered the other objections to its sufficiency which were made at the argument.

Judgment on the verdict.

WILLIAM H. HASKELL *vs.* WILLIAM H. BOARDMAN & another.

The holder of a promissory note, who receives notices of its non-payment and protest for the indorsers, is bound to forward them by the earliest practicable post after the day on which he receives them.

Indorsers of a promissory note do not waive notice of its non-payment by taking from the maker a mortgage of all his property, with a general condition to save them harmless from all contracts entered into by them for him, and by selling the property under a power of sale contained in the mortgage, for breach of condition.

CONTRACT against the indorsers of a promissory note for $550, dated October 19, 1861, and signed by S. M. Boardman.

At the trial in the superior court, before *Brigham*, J., it appeared that the plaintiff, who was the holder of the note, lived in West Amesbury, and that he there received from a bank with which it had been deposited for collection notices for the indorsers of its non-payment and protest, in due form, on Friday, the 24th of January 1862; that on the following morning, at a few minutes after ten o'clock, he deposited them in the post-office at West Amesbury, addressed to the defendants, and prepaid; and that the only mail that day from West Amesbury

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had been sent at ten o'clock, so that the notices did not go till the following Monday.

It further appeared that on the 19th of May 1861 the maker of the note executed to the defendants one mortgage of real and another of personal estate, the condition of both being the same, the material portion of which was that the grantor should "fulfil and perform all contracts which the said grantees have heretofore signed, indorsed or executed for the said grantor, and which said grantees shall hereafter sign, indorse or execute for said grantor as indorsers, guarantors, sureties or otherwise, and save the said grantees harmless from all costs and expense in consequence thereof." The mortgage of real estate also contained a power of sale, under which the premises were sold by the defendants on the 9th of July 1862. The plaintiff also introduced evidence tending to show that these mortgages covered all the property of said Boardman, and that the property was sufficient to indemnify the defendants for all their engagements in his behalf; that, at the time when these mortgages were made, a firm of which the plaintiff was a member held Boardman's note, to fall due in June 1861, secured by a mortgage of the same personal property; that it was then agreed between the plaintiff and the defendants that at the time when his firm's note should become due they would take it up or it should be renewed with their indorsement, and the mortgage to the plaintiff's firm should thereupon be discharged; that accordingly in June 1861 said note was renewed by taking a new note of Boardman with the defendants' indorsement, and the mortgage was accordingly discharged; and that the note in suit was taken in renewal of the note so taken in June, and afterwards became the property of the plaintiff. But the judge ruled that these facts, if proved, would not show a waiver by the defendants of notice of the non-payment of the note, and that the plaintiff was bound to deposit the notices in the post-office before the departure of the mail on the 25th of January 1862; and he directed a verdict to be returned for the defendants, which was accordingly done. The plaintiff alleged exceptions.

S. B. Ives, Jr., for the plaintiff. There is no rule of law which

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made it necessary for the plaintiff to mail the notices before ten o'clock in the forenoon, but it is a question of reasonable diligence. See *Whitwell* v. *Johnson*, 17 Mass. 449; *Eagle Bank* v. *Chapin*, 3 Pick. 180; *Bank of Utica* v. *Smith*, 18 Johns. 230. A conveyance of all the property of the maker of a note to the indorsers as security is evidence of a waiver of demand and notice. *Bond* v. *Farnham*, 5 Mass. 170. *Tower* v. *Durell*, 9 Mass. 332. *Andrews* v. *Boyd*, 3 Met. 434. *Mead* v. *Small*, 2 Greenl. 207. *Prentiss* v. *Danielson*, 5 Conn. 180. *Mechanics' Bank* v. *Griswold*, 7 Wend. 165. *Spencer* v. *Harvey*, 17 Wend. 489. *Commercial Bank* v. *Hughes*, Ib. 94. 3 Kent Com. (6th ed.) 113. Some of these cases decide that the taking of sufficient security is equally significant of a waiver. In this case, the plaintiff himself actually furnished part of the security, by relinquishing the prior mortgage on the property.

D. Saunders, Jr., for the defendants, cited, upon the question of diligence in giving notice, *Whitwell* v. *Johnson*, 17 Mass. 449; *Talbot* v. *Clark*, 8 Pick. 51; *Carter* v. *Burley*, 9 N. H. 558; *Manchester Bank* v. *Fellows*, 8 Fost. (N. H.) 302; *Northern Bank* v. *Williams*, 21 Maine, 217; *Beckwith* v. *Smith*, 22 Maine, 125; and, on the question of waiver, *Creamer* v. *Perry*, 17 Pick. 332; *Pierce* v. *Cate*, 12 Cush. 190; *Taylor* v. *French*, 4 E. D. Smith, (N. Y.) 458; *Moses* v. *Ela*, 43 N. H. 557; *Woodman* v. *Eastman*, 10 N. H. 359.

Bigelow, C. J. Due diligence was not used to give notice to the defendants of the dishonor of the note. The holder was not bound to send the notices on the day he received them from the bank, nor was it practicable to do so; but they should have been put into the post-office so that they might have been forwarded by the mail which was sent on the next day. The rule is, that such notices should go by the next practicable post after the day on which the holder receives notice of the dishonor of the note. No reason is shown for the neglect to send the notices to the defendants by the mail which left West Amesbury at ten o'clock on the morning of the 25th of January. It was the duty of the plaintiff to use due diligence in ascertaining the hour at which the mail closed on that

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day, and to put his notices into the office seasonably to go forward by that mail. His failure to do so is such laches as to render the notices insufficient to charge the indorsers. Chit. Bills, (10th Amer. ed.) 485, and cases cited.

There was no evidence offered at the trial on which a waiver of notice by the indorsers could be legally found. The mortgages relied on to show such waiver were not made to enable the indorsers to pay the notes, nor were they authorized to appropriate the property thereby conveyed to such purpose. The effect of these conveyances was only to secure the defendants against the legal liabilities assumed by them in behalf or on account of the promisor. Their liability as indorsers was conditional only, dependent on the contingency of their having due and seasonable notice of the dishonor of the notes. Their claim on the property for indemnity was dependent on the like contingency. On this point the case is within *Creamer* v. *Perry*. 17 Pick. 332. There was no other fact in proof to warrant a jury in finding a waiver. *Exceptions overruled*

FITZ H. LANE *vs.* ELI F. STACY.

Joint payees of a note who indorse it are joint and not successive indorsers, and either of them is entitled to share in a security taken from the principal debtor by the other.

BILL IN EQUITY, alleging that the defendant is the administrator of the estate of E. H. Stacy, deceased; that E. H. Stacy and the plaintiff were the payees of a note executed by Ignatius Winter, and indorsed the same for Winter's accommodation; that E. H. Stacy took a mortgage of personal property from Winter to secure him from loss by reason of his said indorsement; that Winter failed to pay the note, and the plaintiff has since paid the same, and has been unable to obtain reimbursement from Winter; and that the plaintiff has applied to the defendant to assign to him one half of said mortgage, which the defendant has refused to do. The prayer was that the defendant might be ordered to make the assignment, and for other

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and further relief. It was agreed by the parties that the plaintiff had no knowledge of the security taken by Stacy at the time it was taken, and that there was no agreement that it should enure to his benefit. The case was reserved by *Dewey*, J. for the determination of the whole court.

S. H. Phillips, for the plaintiff.

C. P. Thompson, for the defendant.

Hoar, J. It is not denied by the defendant that a surety is entitled to share in the benefit of the security taken by his co-surety. But he contends that his intestate was not the co-surety of the plaintiff; and relies upon the well settled rule, that the liability of successive indorsers upon a note is fixed by the contract which the position of their names upon the paper establishes, and that, unless by express agreement, one is not bound to contribute to a payment of the note by the other, even if both are accommodation indorsers. The principle is sound, but has no application to the case at bar. Stacy and Lane are not successive indorsers. They are joint indorsers. The note was made payable to their joint order, and could only be transferred by their joint act. Which name is first put upon the paper is therefore immaterial, as by the indorsement they incurred a joint esponsibility for the debt of the promisor. Each is therefore entitled to share in the security taken by the other.

Decree according to the prayer of the plaintiff's bill.

Ebenezer L. Saunders *vs.* John McCarthy.

If a promissory note is given payable by instalments, "with interest on the said sum," no interest is due upon the last instalment until the instalment becomes due.

Oral admissions made by an attorney out of court in a conversation had for the purpose of settling a suit, though relating to facts in controversy in the suit, are not admissible in evidence against his client.

The payee of a promissory note payable by instalments has a right to apply the proceeds of personal property held by him under a mortgage as collateral security, and sold under a power of sale contained in the mortgage, towards the payment of any instalments which may be due, at his option, if there is no agreement or direction to the contrary.

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Saunders v. McCarthy.

In a suit upon a promissory note, in which the amount of the proceeds of certain collateral security realized by the plaintiff, consisting of standing trees, was in controversy, it appeared that the plaintiff had indorsed upon the note a certain sum as received by him therefor; and the defendant introduced and offered evidence to show that at one time the plaintiff and his brother said to him, "We have taken possession of the wood, and cut it off, and sold a part of it to Reed;" that Reed bought a lot of the plaintiff's brother for a larger sum than that indorsed upon the note, and never at any other time bought any wood of the plaintiff or his brother; that there was also a large quantity of wood left there after the sale to Reed, the amount and value of which he offered to prove; and that the defendant never had any of it. *Held*, that this evidence ought to be submitted to the jury for them to determine how much the plaintiff realized from his security, and that a direction to the jury to find a verdict founded upon the amount indorsed by the plaintiff was erroneous.

CONTRACT brought by the payee against the maker of a promissory note for $825, dated October 7, 1857, payable as follows: 'One hundred dollars on the first day of March A. D. 1858, and the balance in two years from this date, with interest from the first day of November next on the said sum." The writ was dated November 13, 1858, and was brought to recover the first instalment of the note. The note bore this indorsement: "Nov. 19, 1859. Received on within four hundred and eighty-eight dollars, amount received on sale of personal property mortgaged to secure this note, and applied to payment of last instalment."

At the trial in the superior court, before *Brigham*, J., it appeared that the note was given for the price of some standing wood in New Hampshire, of which a mortgage, with power of sale, was executed by the defendant to the plaintiff as collateral security to the note. The defendant testified that he had never taken or received any part of the wood, and that after the note became due "he met the plaintiff with his brother, Frank Saunders, and the plaintiff then said, 'We have taken possession of the wood, cut it off, and sold part of it to Mr. Reed.'" There was no other evidence as to how or when the wood was sold, except what might be inferred from the indorsement on the note. Rufus Reed testified that he bought a lot of wood of Frank Saunders, before it was cut, for $1200, and never bought any of the plaintiff or his brother at any other time. The defendant then offered to prove that there was a large quantity of other wood on the land at the time, besides what was sold to Reed, and to show its amount, quality and value

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but the evidence was rejected. The defendant also offered to prove that, at one time when he met the plaintiff's counsel for the purpose of settling the matter of the suit and of ascertaining the amount which the plaintiff had received, the counsel told him that the wood sold to Reed was the wood which was mortgaged, and also how much wood was sold; but this evidence was rejected. The defendant contended that the money received from the sale of the wood should be applied first to the payment of the first instalment of the note; but the judge ruled that "there was no evidence of the amount for which the wood was sold, except what might be inferred from the indorsement on the note; and that the amount so indorsed should be applied to both instalments in proportion as the instalments bore to each other;" and he ordered a verdict for the plaintiff, for the sum of $181.94. The defendant alleged exceptions.

It also appeared that the plaintiff had commenced another action to recover the last instalment of the note.

D. Saunders, Jr., for the defendant, cited, as to the admissibility of the evidence of the value of the property, *Howard* v. *Ames*, 3 Met. 308; *Hunt* v. *Nevers*, 15 Pick. 500; *Hedge* v. *Holmes*, 10 Pick. 380; *Amory* v. *Fairbanks*, 3 Mass. 562; *Hunt* v. *Stiles*, 10 N. H. 466; *Smith* v. *Packard*, 19 N. H. 575: as to the declarations of the plaintiff's attorney, *Merrifield* v. *Robbins*, 8 Gray, 151; *Morse* v. *Connecticut River Railroad*, 6 Gray, 450; *Corbin* v. *Adams*, 6 Cush. 93; *Lewis* v. *Sumner*, 13 Met. 269; *Baring* v. *Clark*, 19 Pick. 220; *Haven* v. *Brown*, 7 Greenl. 424; and as to the application of the money, *Hunt* v. *Nevers*, 15 Pick. 504; *Blackstone Bank* v. *Hill*, 10 Pick. 129; *Parks* v. *Ingram*, 2 Fost. (N. H.) 283; *Caldwell* v. *Wentworth*, 14 N. H. 437.

S. B. Ives, Jr. & J. B. Lord, for the plaintiff, cited, as to the application of the money, (in addition to cases cited by the defendant,) *Upham* v. *Lefavour*, 11 Met. 174; *Capen* v. *Alden*, 5 Met. 268; *Commercial Bank* v. *Cunningham*, 24 Pick. 270; *Allen* v. *Kimball*, 23 Pick. 473.

CHAPMAN, J. The first question to be determined is, the amount which, independently of payments, should be recovered

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in this suit. When the action was commenced, the sum of $100 had become due, but the balance of the principal was not due. As to the interest, by the terms of the note it was payable on the whole note, including the $100, from November 1, 1857. But it was not to be paid annually, and therefore no interest became due on the balance of the principal until the principal itself became due; so that the amount to be recovered in this action, disregarding payments, is the sum of $100, with interest thereon from November 1, 1857.

The second question relates to the admissibility in evidence of certain admissions alleged to have been made by the plaintiff's attorney. The admissions did not relate to the suit, and therefore are unlike those which are referred to in *Lewis* v. *Sumner*, 13 Met. 269. The Gen. Sts. *c.* 129, § 60, require that all such agreements of attorneys shall be in writing, otherwise they shall be of no validity. The admissions in this case were mere matters of conversation, and though they related to the facts in controversy, they cannot be received in evidence against the plaintiff. The attorney was not the agent of his client to make such admissions. 1 Greenl. Ev. § 186. If they had been in writing they would not have been admissible.

The remaining question relates to the payments, and the proper application of them. As the whole note was due at the date of the indorsement, the plaintiff had a right to appropriate the amount he received to either instalment, at his option. *Allen* v. *Kimball*, 23 Pick. 473. It cannot be considered as a payment by process of law or *in invitum*, like payment by levy of an execution, as was the case in *Blackstone Bank* v. *Hill*, 10 Pick. 129. But it was paid by the sale of property under an agreement with the defendant, in which the defendant reserved no right to make the appropriation. And the rights of sureties are not concerned in the present case, if that be a material fact.

But the defendant contends that the plaintiff received a larger sum than that which he has indorsed, more than enough, in fact, to have paid the whole amount due on the note. He offered certain evidence which the presiding judge held to be insufficient in law to establish the fact. It seems to us that

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there was evidence to be submitted to the jury. It was in evidence that the plaintiff, while in company with his brother Frank, said to the defendant, "We have sold part of the wood to Mr. Reed." This apparently referred to Frank as well as himself. A Mr. Reed was called, who testified to having purchased wood of Frank Saunders. The evidence does not appear to be fully reported; but, taking the whole report, it seems to us that the question of the identity of this sale with that admitted by the plaintiff should have been left to the jury.

But the defendant offered other evidence which was excluded. He offered to show how much wood there was on the lot at the time of the sale to him. This was at the time the mortgage was given. He also offered to prove that there was, besides the wood sold to Reed, a large quantity of other wood, and to show the quality and value thereof. It was already in evidence that the defendant had never taken or received any of said wood. The court are of opinion that the evidence offered was admissible, as having some tendency to show that the sale to Reed was in fact the same sale admitted by the plaintiff to have been made. It might not be sufficient to convince the jury, but it was at least admissible. The exception on this point is therefore sustained.

It is contended that the plaintiff proceeded according to the laws of New Hampshire. But he offered no evidence on this point, and it is not before us.

The facts in regard to the second action of the plaintiff are not material to any of the questions which we have decided.

Exceptions sustained.

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ALPHEUS CURRIER *vs.* WILLIAM HALE.

In an action on a note that is made payable absolutely, evidence is not admissible to prove an oral agreement, when the note was made, that it should remain in the payee's hands, to be paid out of certain moneys which he expected to receive for the maker, and not otherwise.

CONTRACT upon a promissory note signed by the defendant and payable to the plaintiff or order.

At the second trial in the superior court, before *Vose*, J., after the decision reported in 5 Allen, 561, it appeared that the parties were partners in certain transactions in real estate; that in January 1856 they met to settle them, up to that time, and a balance was found due to the defendant; and that the plaintiff thereupon introduced a private claim against the defendant, which after some discussion was allowed, and the note in suit was given for the balance thus found due to the plaintiff. The defendant then offered to prove, by his own testimony, that at the time the note was given the plaintiff agreed that it should remain in his hands as a part of the partnership account, to be paid by any balance which might afterwards be due to the defendant from moneys received by the plaintiff for the firm; but the judge rejected the evidence, and ordered a verdict for the plaintiff. The defendant alleged exceptions.

W. C. Endicott, for the defendant.

H. Carter, for the plaintiff, was not called upon.

DEWEY, J. The court properly ruled that it was not competent to prove by parol evidence such an agreement as to the note as was proposed, and that the defence relied upon could not avail the defendant. Of the numerous authorities that might be cited to sustain such ruling, those of *St. Louis Ins. Co.* v. *Homer*, 9 Met. 39, *Adams* v. *Wilson*, 12 Met. 138, and *Tower* v. *Richardson*, 6 Allen, 351, may be referred to as especially in point. *Exceptions overruled.*

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Josiah Haskell *vs.* Henry Dennis & another.

If one who by a written assignment is entitled to receive the earnings of another accep's an order to pay the same to third parties, when earned and received, he is bound to apply upon the acceptance all sums afterwards received by him, and has no right when receiving the same to agree to apply a portion thereof to the payment of other debts of the drawer, or to receive the same on condition that he will so apply them, or to assign to another person his right to receive such earnings, without the consent of the holder of the order.

Contract upon an acceptance as follows:

"$1000. Rockport, Dec. 10, 1860.

"To James Manning and Henry Dennis. Gentlemen: Please pay to Josiah Haskell one thousand dollars, when the amount is earned by me on the railroad, it being for value received. (Signed) William Sullivan."

"Accepted to pay when earned and received by us, after the amount for which we are responsible on said Sullivan's account is paid, being the sum of seven hundred and ninety dollars. (Signed) Henry Dennis, James Manning."

At the trial in the superior court, before *Putnam*, J., it appeared that Sullivan was a sub-contractor to build a section of a railroad under a contract with the principal contractors, E. Gilmore & Co.; that he had assigned his contract to the defendants; that afterwards, being indebted to the defendants in the sum of $790, he drew the above order upon them in favor of the plaintiff; that they accepted the same, in the terms above copied; that afterwards they received of Gilmore & Co. upon Sullivan's contract the sum of $1000, only $640 of which had at that time been earned; that Sullivan then owed $480 for work and materials employed in carrying on the work to that time; that Gilmore & Co. paid the $360 above what was due on the express condition and agreement that the defendants should pay Sullivan's outstanding debts to the amount of $480 as aforesaid; that the defendants accordingly paid the same, and applied the residue of the money towards the discharge of their own claim; and that Sullivan subsequently earned the

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whole amount of the $360 so advanced by Gilmore & Co., though a portion thereof was not earned till after the 10th of January 1861, when the defendants assigned the contract to one McGregor. The plaintiff also offered to show that, after the assignment to McGregor, Gilmore & Co. paid to him amounts earned by Sullivan more than sufficient to cover the full amount of the acceptance in suit, and that this assignment was made without the plaintiff's consent or knowledge; but the judge rejected the evidence, and ruled that the plaintiff was not entitled to recover. A verdict was accordingly returned for the defendants, and the plaintiff alleged exceptions.

S. H. Phillips, for the plaintiff, cited *Eaton* v. *Mellus*, 7 Gray, 566; *Lannan* v. *Smith*, Ib. 150, and cases cited; *Austin* v. *Kimball*, 12 Cush. 485, and cases cited; *Adams* v. *Robinson*, 1 Pick. 461.

W. G. Choate, for the defendants.

Merrick, J. When the defendants accepted the order drawn on them in favor of the plaintiff by Sullivan, they were entitled to receive whatever sums he had already earned or should afterwards earn in the performance of the written contract between him and Gilmore & Co., of which they then held a valid assignment. Their acceptance of the order was in special terms, to pay the amount mentioned in it whenever so much should be earned by Sullivan and received by them, over and above the sum of $790, for which they had otherwise become responsible on his account. The plaintiff thus acquired a direct interest in the assignment of said contract to the defendants, and they became bound to retain it for his benefit and to use reasonable diligence to make it available to him; for after the acceptance of the order they held the assignment in trust for him. They were to collect and receive whatever Sullivan should earn in the performance of the contract, and make the appropriation of it in the manner stipulated by them. They err in assuming that they were to receive only the net earnings of Sullivan, or the profits which he should make in the execution of the work undertaken by him. The assignment entitled them to collect from Gilmore & Co. whatever sums should become due from

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them to Sullivan, and their acceptance of the order bound them to apply the proceeds so received, first to indemnify themselves against their liabilities previously contracted, and then towards the payment of the thousand dollars due to the plaintiff. They could not, therefore, without violating his rights, enter into new stipulations with Gilmore & Co. that they would make a different appropriation of any sum of money received from Gilmore & Co. on account of the earnings of Sullivan; nor could they, without the consent of the plaintiff, divest themselves of all right under the contract by assigning it to other persons. Sullivan did not agree with the defendants in positive terms that he would go on and fulfil his contract with Gilmore & Co., although it is obvious that when he made the assignment of it he intended and expected to do so. If he had chosen to stop altogether, and had afterwards done nothing under the contract, he would have earned nothing, and these defendants could never have received anything, or have incurred or been subjected to any liability under their acceptance of his order. But he did in fact continue to pursue the work, and he earned all the money that was afterwards paid to the defendants and to McGregor after the assignment made to them. It is of no consequence, so far as the right of the plaintiff is concerned, that a part of the money paid to the defendants was paid by Gilmore & Co. in advance; it was paid, and was afterwards applied to the discharge of the earnings of Sullivan which became due. The plaintiff is entitled to insist that this sum, together with so much of what was subsequently paid to McGregor as would amount in the whole to a thousand dollars, should have been received and held by the defendants to his use, and paid in discharge of the order of Sullivan in his favor which they had accepted.

The court therefore erred in ruling that, upon all the evidence in the case and upon the facts offered to be shown, the plaintiff was not entitled to recover; and his exceptions must be sustained, the verdict against him set aside, and a new trial granted.

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Ezekiel R. Todd *vs.* Inhabitants of Rowley.

It is the duty of a highway surveyor, under Gen. Sts. c. 44, § 14, if he has not sufficient means to repair a highway in his district, to make a formal application to the selectmen for their written consent to the employment of persons to repair the same, so that it shall be safe and convenient, although he may have reason to believe that they will refuse to give it; and if he does not do so within a reasonable time, he cannot recover for an injury sustained by reason of a defect in such highway.

A highway surveyor has no authority to expend any portion of the money committed to him for the repair of highways in changing the line of travel and constructing a new road; and if he does so, and thereby exhausts his funds with which he might have repaired the roads already in use, he cannot recover for an injury sustained by reason of a defect in a highway within his district, which he might have repaired by the proper application of the funds.

If, in an action to recover for an injury sustained by reason of a defective way, it becomes a material question whether the plaintiff's horse had a habit of shying at the time of the accident, the defendants, after introducing evidence of instances of his shying before that time, may also prove similar instances afterwards.

Tort to recover for a personal injury sustained by reason of a defective way.

At the trial in this court, before *Dewey*, J., it appeared that the injury was received on the 11th of June 1861; that the plaintiff was one of the highway surveyors of Rowley for that year, and his district included the place where the accident occurred; that he received his warrants on the 22d of May, which authorized him to expend $44.60 upon the roads assigned to him; that he immediately proceeded to work, and expended about fifty-six dollars in widening the graded part of a highway near his own house, and to some extent in changing the line of travel on to a part of the located way where the travel had not before gone; and that he completed the work "on one of the first days in June." The extent and character of this change was in dispute between the parties, the defendants contending that it amounted to making a new way altogether. The plaintiff made no formal application to the selectmen for more means; and there was evidence which tended, as he insisted, to show that he had a right to understand that it would be useless for him to ask them therefor.

One ground of defence was, that the plaintiff was driving an

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unsafe horse, whose vicious habit of shying contributed to the injury; and the defendants, after introducing evidence tending to prove two instances of the horse's shying before the time of the accident, were permitted to show many similar instances afterwards, up to March 1863.

The judge instructed the jury that it is the duty of a highway surveyor to exhaust all the means afforded to him for putting the roads in his district into repair; and if there was a deficiency in them, after adding the ten dollars authorized by Gen. Sts. *c.* 44, § 13, he ought to make application to the selectmen to allow him to make such further expenditures as may be necessary; and if he neglects to do so, and subsequently receives an injury from a defect in a road within his district, he cannot maintain an action against the town to recover damages therefor, unless it appears that he was justified in omitting to make such application, by good and sufficient reasons.

The plaintiff thereupon asked specifically for the following instructions:

"1. A surveyor can maintain an action for an injury caused by a defect in the highway, although in his own district, unless such defect was caused or suffered to exist by his own negligence or neglect of duty.

"2. The surveyor had the right to spend the money allotted to him as a highway tax, in making such portion of the highways safe and convenient as was proper in his judgment, he acting in good faith; and the correctness of such judgment cannot be inquired into, for the purpose of imputing negligence as to another portion, but is to be conclusively presumed.

"3. If the plaintiff, as surveyor, actually spent all the money assigned to him, in good faith, in working upon a part of the highways within his district, even if part of such money was spent in changing the line of travel and making a new path for a part of the distance, then he is not to be charged with negligence in not spending such money upon the place where the alleged accident took place, but the question of negligence depends upon other considerations.

"4. A surveyor may lawfully judge for himself in what part

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of his district he may spend his highway tax, and the jury cannot inquire into the propriety of his decision, unless they find that he acted in bad faith.

"5. If a surveyor finds the tax allotted to him insufficient to repair all the ways in his district, so as to make them safe and convenient, he may lawfully make his election as to which he will first repair, and is not to be considered negligent in not repairing any other place, until he has spent his tax and his additional ten dollars, and has unreasonably neglected to ask the consent of the selectmen to make such other repairs.

"6. This plaintiff cannot be charged with negligence in not causing the place of this accident to be repaired, unless the jury find that he neglected, for an unreasonable time after he had expended his tax and the additional ten dollars, to call upon the selectmen for their consent to expend more money; and it is for the jury to say whether, in this case, upon the evidence, eight or ten days was such an unreasonable time.

"7. If the jury find, upon all the evidence in the case, that the plaintiff had reason to believe that the selectmen would refuse their consent, he is not to be charged with negligence in failing to make a formal application to them.

"8. The whole question of negligence on the part of the plaintiff in this respect is a question of fact for the jury; and if they find that he acted as a prudent and reasonable man, who had the same opportunities of knowing the feelings and disposition of the selectmen, and who was placed in similar circumstances, would have acted in his place, then he cannot be said to have been guilty of negligence, such as would bar him of his action, if he makes out the other elements of his case."

The judge adopted the first, second, fourth, fifth and sixth prayers of the plaintiff, and so stated the law to the jury

As to the third prayer, the judge qualified the same as follows:

"Repairs to the highway, for which money is to be expended by the district surveyor under the ordinary warrant like that in the present case, mean repairs to existing roads, and are not intended to be applied to the construction of a newly located road

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never worked, and for the first time to be prepared for the public travel; and if the surveyor for the district expends the money committed to him for ordinary repairs upon the said newly located road, and by reason thereof exhausts his funds with which he might have made other repairs upon the roads already in use and fitted for travel, he cannot recover of the town for an injury sustained by reason of defects existing elsewhere in the highways in his district, which might have been repaired by the proper application of the funds in his hands."

As to the seventh and eighth prayers, the case was put to the jury under the instructions already stated, as embracing all that was required on these points.

The judge also instructed the jury that the evidence of the horse's shying since the time of the accident was competent only for the purpose of showing that he had this vicious habit at the time of the accident.

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

C. Cushing & S. B. Ives, Jr., for the plaintiff. 1. If the plaintiff had reason to suppose that an application to the selectmen for more means would be useless, he was not negligent in omitting to make it. No man can be charged with negligence, because he omits to do what would be clearly useless and vain. Clearly there might be good and sufficient reasons to excuse him from this act. The plaintiff proved to the jury reasons which he considered to be good and sufficient; so that prudent men in his position would have acted as he did. By the refusal to give the instruction asked for, and to explain the instruction which was given, and apply it to the evidence in the case, the plaintiff was prejudiced. 2. It was the duty of the town to work all that part of the way which the plaintiff expended money upon; *Nichols* v. *Salem*, 14 Gray, 490; and no other person than the plaintiff had authority to spend labor or money thereon. The instructions upon this point, as applied to the facts, would have forbidden the plaintiff to widen the travelled path, or fill up a ditch. The qualification put upon the third prayer for instructions substantially nullified it. *Callender* v.

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Marsh, 1 Pick. 425, 428. 3. The evidence as to subsequent instances of the horse's shying was incompetent. A habit is something which is acquired; and when once acquired may be presumed to continue. But presumptions never run backwards; and especially in a case like the present, where the vicious habit may have been the result of the accident in question. See *Elsam* v. *Faucett*, 2 Esp. R. 562; *Foulkes* v. *Sellway*, 3 Esp. R. 236; *Bamfield* v. *Massey*, 1 Camp. 460; *Dodd* v. *Norris*, 3 Camp. 519; *Johnston* v. *Caulkins*, 1 Johns. Cas. 116; *Boynton* v. *Kellogg*, 3 Mass. 189.

J. C. Perkins & W. C. Endicott, for the defendants, cited, as to the first point, *Wood* v. *Waterville*, 4 Mass. 422; S. C. 5 Mass. 294; *Loker* v. *Brookline*, 13 Pick. 343; *Palmer* v. *Carroll*, 4 Fost. (N. H.) 314; *Walcott* v. *Swampscott*, 1 Allen, 101; as to the second point, *Bowman* v. *Boston*, 5 Cush. 1, and cases cited; and as to the third point, *Murdock* v. *Warwick*, 4 Gray, 178; *Chamberlain* v. *Enfield*, 43 N. H. 356.

Bigelow, C. J. We have carefully examined the rulings to which objection is now taken by the plaintiff's counsel, and do not find that they were in any respect insufficient or erroneous.

1. The first and most important question arises on the instructions given to the jury as to the duty of the plaintiff, in his capacity as highway surveyor of the district in which the accident happened, to make application to the selectmen of the town for permission to expend a further sum in repair of the roads within the limits assigned to him, in addition to that which he had laid out when he completed his work thereon early in the month of June. It is obvious that the point involved in this inquiry had a very material bearing on the issue before the jury. If the plaintiff had in any particular failed to perform his whole duty as surveyor in keeping the ways in his district in proper repair, or in obtaining the requisite means for that purpose, by reason of which the alleged defect in the road was allowed to remain, it is clear, on familiar principles recognized in the adjudicated cases, that his own neglect in part contributed to the accident by which he was injured, and he cannot maintain an action against the town to recover damages

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therefor. *Wood* v. *Waterville*, 4 Mass. 422; S. C. 5 Mass. 294. *Loker* v. *Brookline*, 13 Pick. 343, 347. A surveyor of highways is a special agent with a strictly limited authority, and has no right to bind the town by his acts or contracts beyond the scope of the precise power which is by law vested in him. And this power is the exact measure of his duty. He is bound to disburse the whole sum intrusted to him for the repair of the highways within his district, and also the additional sum of ten dollars which he is authorized to expend in case of a deficiency in the amount appropriated by the town, as is provided by Gen. Sts. *c.* 44, §§ 12, 13. But a further duty is imposed on him by § 14. If a town neglects to vote a sufficient sum of money for the purpose of making repairs on the highways, or does not otherwise effectually provide therefor, the surveyor, "first having obtained the consent of the selectmen for that purpose in writing," is authorized to repair the ways within his district, so that the same shall be safe and convenient. If he fails to perform this part of his duty, he is guilty of neglect. If, in the contingency contemplated by this section of the statute, he omits to apply to the selectmen for their consent to make the additional expenditure requisite to a proper repair of the roads within his limits, he leaves an essential part of his official duty unperformed, and takes on himself the consequences of his own negligence. If he is subsequently injured by a defect in a road lying within the district assigned to him, he cannot recover compensation from the town, if it appears that he has failed within a reasonable time to make application to the selectmen for their consent to make additional repairs, in compliance with the provisions of law, or unless he shows that for sufficient cause such application could not have been made by him, or that, if made, it would have been impracticable to repair the defect, even if the necessary assent had been obtained. This general doctrine the plaintiff does not controvert. But he contends, and this is the point wherein he alleges the instructions to the jury were defective and erroneous, that he offered evidence tending to show that an application to the selectmen for their consent to make additional repairs would have been ineffectual and

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useless, and that he was entitled to ask that the jury should be instructed that he was not guilty of negligence in failing to make a formal application to the selectmen, if he had reason to believe they would refuse their assent, and if a reasonable and prudent man would under like circumstances have acted in the same manner. It seems to us, however, that this instruction would have gone altogether too far. The surveyor of highways had no right to act on his own opinion or judgment that an application to the selectmen for their consent to make further repairs on the road would be denied. His legal duty was to make the application. The law vests in him no discretion whatever. Certainly it does not authorize him by casual conversations with the selectmen separately, apart from each other, to form a judgment whether their assent will be given or refused, and, in the latter alternative, to omit to discharge the duty which the law imposes upon him. Indeed, the result of an application such as the statute contemplates could not be known to the selectmen themselves until they had met together to consider and decide upon it. The power vested in them to grant or withhold their assent is intrusted to them, not as individuals acting separately, but as members of a board, in their official capacity, acting together, upon due deliberation and consultation. As indicating that the act is to be a formal one, the statute expressly requires that the assent, if given, shall be in writing. It is obvious that any attempt by the surveyor of highways to anticipate the judgment of the selectmen on such a matter would be not only entirely unauthorized, but would lack the essential elements on which a safe and correct opinion could alone be founded. The instructions given to the jury were in conformity to this view of the duty of the plaintiff as surveyor of highways; and they were accompanied with proper qualifications, which prevented a too strict application of the rule of law to the plaintiff's case. The jury were told that he was to be allowed a reasonable time within which to make the requisite application to the selectmen, and that if, for any reason, it was impracticable for him to do so, his omission to make it would be excusable, and would not render him

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chargeable with negligence. But the instructions asked for went much further, and, if given, would have authorized the jury to find a verdict for the plaintiff, although he had wholly omitted to perform his legal duty by making an application to the selectmen, because in his opinion it would have been refused. Such a result he had no right to presume. It could only be made certain by making the application in form to the selectmen, and submitting to them the question after the exhaustion of all the means for making repairs which had been put into the plaintiff's hands.

2. The instruction as to the duty of the surveyor to expend the money in his hands and within his control, under the warrant intrusted to him, on repairs of existing roads within his district, and not in the construction of new roads, or of portions of a road newly located and laid out, and never before wrought for public travel, was strictly correct. The meaning of the word "repair" is a key to the true interpretation of the statute. It does not mean to make a new thing, but to refit, make good or restore an existing one. The construction of highways does not come within the ordinary duties of a surveyor, but is usually effected by special contracts, or by persons employed for the purpose. Nor can we see that it makes any difference as to the duty of a surveyor, that a portion of an existing road within his district has been widened by lawful authority. So far as such enlargement of the way includes additional land, it is in effect a new way, and it sometimes happens that to complete and prepare it for travel requires a large expenditure. Clearly the surveyor has no lawful authority to use the money placed in his hands for ordinary repairs on existing roads in making new structures and additions thereto.

3. The objection to the evidence relating to the habits of the horse subsequent to the time of the accident goes to its weight rather than to its competency. The habit of an animal is in its nature a continuous fact, to be shown by proof of successive acts of a similar kind. Evidence having been first offered to show that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently

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manifested a similar disposition was competent to prove that his previous conduct was not accidental or unusual, but frequent, and the result of a fixed habit at the time of the accident. Under the limitations prescribed at the trial, we think the evidence was admissible. *Chamberlain* v. *Enfield*, 43 N. H. 356.

Judgment on the verdict.

THOMAS S. BRADLEY *vs.* CHARLES H. HALE.

A merely colorable sale of goods gives no such title to the pretended purchaser as will enable him to maintain an action for their price against a subsequent purchaser.

CONTRACT to recover the price of lumber sold and delivered. The answer denied that the purchase was made of the plaintiff, or that the plaintiff then owned the property.

At the trial in the superior court, before *Vose*, J., it appeared that the lumber was formerly owned by Daniel Silloway, who executed a bill of sale thereof to the plaintiff in December 1856, and received the plaintiff's notes therefor; and there was evidence tending to show that this transaction was merely colorable. Silloway afterwards sold a part of the same to the defendant.

The defendant testified that he did not make the purchase on his own account, but on the credit of another person; and to a portion of his testimony upon this part of the case objections were made, which are now immaterial.

The judge instructed the jury "that the plaintiff was not authorized to maintain his action, unless he satisfied them of his title to the goods sold; that the execution of a bill of sale, and a delivery of it to the plaintiff, accompanied by a payment for the property in notes or money, would be sufficient, in the absence of other evidence, to vest the title to the lumber in the plaintiff, so far as to enable him to maintain this suit for the price of any of the property sold by Silloway to a third person, and this, though the purpose of such conveyance may have been

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to cover up the property from Silloway's creditors; but if, at the time of making and delivering the bill of sale, it was the intention and understanding of the parties to it that the title to the property should not vest in Bradley, and that the lumber should continue to be the property of Silloway, to continue under his custody and control, and be disposed of for his benefit, as his property, then the making and delivery of the bill of sale and notes were a mere formality, which passed no title to Bradley which would enable him to maintain this suit."

The jury returned a verdict for the defendant, and found specially that at the time of the sale the property belonged to Silloway. The plaintiff alleged exceptions.

S. B. Ives, Jr., for the plaintiff, cited *Dyer* v. *Homer*, 22 Pick 255.

J. C. Perkins, for the defendant.

METCALF, J. The jury have found a verdict for the defendant, on the ground that when Silloway made to the plaintiff the alleged sale and delivery of the lumber, a part of which is the subject of this action, it was the intention and understanding of both parties that the title to the lumber should not vest in the plaintiff, but that the property therein should continue in Silloway and be under his custody and control, and be disposed of for his benefit. And the court are of opinion that the jury were rightly instructed to find this verdict, if they should find that such, as above, were the intention and understanding of the said parties. For, on those facts, the plaintiff had no property in the lumber, and therefore cannot maintain an action to recover pay for it.

The testimony of the defendant at the trial seems to us to have been properly admitted. But that question is now immaterial to the decision of the case, and has not been argued by the plaintiff's counsel. *Exceptions overruled.*

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Daniel Silloway *vs.* Sarah W. Hale.

After a verdict for the demandant in a writ of entry, for a described portion of the demanded premises, and judgment thereon, a writ of error to reverse the judgment will not be sustained on the ground that there are no sufficient monuments or other means to enable the parties accurately to ascertain the land described in the verdict.

Writ of error to reverse a judgment rendered in favor of the defendant in error upon a verdict returned on the trial of a writ of entry, for a portion of the premises therein demanded. The description in the verdict was as follows: "Commencing at the easterly corner of the demanded premises, at land of Thomas Burnham and Daniel Silloway, and thence running by said Silloway's land southwesterly forty-three feet to a corner thence by said Silloway's land northwesterly two rods and fourteen links to a corner; thence northeasterly forty-three feet eleven inches to a corner, by land formerly Banister's; thence southeasterly two rods and eighteen links, by said Banister's land, to point begun at." The errors assigned were, that there were no monuments by which the described premises can be ascertained, and that the description is uncertain, and does not apply to any particular part of the premises demanded in the writ, and that neither in the verdict nor the judgment is there any sufficient description of the premises covered by the verdict and judgment to allow the same to be ascertained; and the plaintiff in error introduced evidence which showed that there are no monuments on the premises, either at the place of commencement or at either of the places called corners. The case was reserved by *Dewey*, J. for the determination of the whole court

S. B. Ives, Jr., for the plaintiff in error.

E. F. Stone, for the defendant in error, submitted the case without argument.

Dewey, J. The error assigned by the plaintiff in error, that neither in the verdict nor judgment thereon is there any sufficient description given of the premises to enable the parties to ascertain the same, is purely a question of fact, and is so dealt

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with by the parties. Although error in fact may sustain a writ of error, the present case does not seem to fall within that class in which judgments have been reversed on that account. Whether a verdict does not sufficiently describe a given parcel of land, or any parcel, so that the same may be ascertained, does not seem to be a question properly raised by a writ of error. The party is not prejudiced by a judgment upon a verdict in a real action, which fails to describe the premises with sufficient minuteness and particularity of boundaries or courses and distances. He cannot be affected by such judgment, if it cannot be applied to any certain parcel of land. From the nature of the case, this question of the accuracy of the description of the land, and whether the same is embraced in the verdict, is to be settled by facts shown by witnesses and plans, and by a reference to all the boundaries which are mentioned therein. If the plaintiff in error is desirous of settling this question, he may easily do so by taking possession, and asserting his title to such land as he supposes the defendant in error claims to hold by his judgment; or he may proceed by his writ of entry to recover the same, and if the defendant in error sets up this judgment as establishing the title in himself, it will be incumbent on him, if he would maintain his title thereby, to show that the verdict upon which such judgment was entered does embrace the premises in controversy. If he fails so to do, the judgment will be wholly ineffectual to aid his title.

The judgment of the superior court must be affirmed, with costs to the defendant in error.

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Daniel P. Whiting *vs.* George W. Cook & others.

A bequest of a sum of money to be divided equally among various persons is a separate bequest of a proportionate share of the whole sum to each; and a writ of error lies to reverse a judgment recovered by them jointly for the whole sum.

Upon a writ of error to reverse a judgment recovered by several persons jointly who were not entitled to maintain a joint action, the defendants in error cannot be allowed to amend by striking out the names of all but one of them; especially if there are no means of determining from the record the amount for which any one of them would be entitled to recover judgment.

Writ of error to reverse a judgment recovered by the defendants, seven in number, against the plaintiff, for a legacy. The plaintiff was executor of the estate of Joseph Whiting, who in his will bequeathed to his daughter Ruth W. Cook the sum of $500, with directions that the same should remain in the hands of his executor, to be paid to said Ruth from time to time, as therein provided, and further provided that, if she should die before the payment to her of the whole sum, then so much thereof as should remain at the time of her death should be equally divided among her children for their exclusive benefit. The declaration in the original suit averred that said Ruth had died; that there remained in the hands of the executor the whole of the five hundred dollars; that the plaintiffs were her children and were entitled to receive the money; and that payment of the same had been demanded and refused. This action was entered at June term 1860, and at June term 1862 judgment was rendered against the executor upon his default for $503.44 damages, and costs of suit.

S. B. Ives, Jr., for the plaintiff in error, cited *Withers* v. *Bircham*, 3 B. & C. 254; *Parks* v. *Knowlton*, 14 Pick. 432; *Fairfield* v. *Burt*, 11 Pick. 244; *Hemmenway* v. *Hickes*, 4 Pick. 497; *Smith* v. *Franklin*, 1 Mass. 480; *Thayer* v. *Hollis*, 3 Met. 369.

C. R. Train, for the defendants in error, cited *Dodge* v. *Wilkinson*, 3 Met. 292; Gen. Sts. *c.* 129, § 42; *c.* 146, § 3.

Merrick, J. The record of judgment shows that each of the plaintiffs in the former suit in which it was rendered had a distinct and separate claim and cause of action; for the provision

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in the will of Joseph Whiting, which is set forth in the declaration, that whatever part of the sum of five hundred dollars, given by him in trust for the use of his daughter Ruth W. Cook during her life, should remain unexpended for the purposes of the trust at her death, should be divided equally among her children for their exclusive benefit, did not constitute a joint bequest, but a distinct and several legacy to each of them of their respective proportions of such remainder. *Parks* v. *Knowlton*, 14 Pick. 432. It is undoubtedly the general rule of law that a misjoinder of causes of action may be taken advantage of by writ of error. *Fairfield* v. *Burt*, 11 Pick. 244. This rule must certainly include the case where the different causes of action belong to several different persons, and they all join in one action to recover the aggregate amount of what is due to them all. Hence it is obvious that the judgment in the former suit was erroneously rendered, and that upon the application of the plaintiff he is entitled to have it reversed.

But the defendants, foreseeing this result, have moved that they may be permitted, under the authority given to the court for that purpose, to make such amendments as will maintain and secure to them the whole or such part of the judgment recovered by them in the former action as substantial justice requires. Gen. Sts. *c.* 129, § 42. But the difficulties in allowing such amendment are insuperable. The only amendment which can be made, so as to authorize the rendition of any judgment in the action, is to strike out all the plaintiffs but one. This might have been done in the original action. *Dodge* v. *Wilkinson*, 3 Met. 292. But if that were now done, the judgment could not stand, for no one of the whole number of the plaintiffs was or is entitled to recover the whole sum for which judgment was rendered. Nor is there anything in the record to show what part of that sum any one of the plaintiffs would be personally entitled to recover; for, all of them having taken judgment for less than the entire claim with interest upon it from the date of their writ, it is obvious that some one or all of them had, before the rendition of judgment, been partly paid and satisfied; and the record now affords no means of determining what was justly

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due to any one of them; and therefore it would be impossible now to render such judgment in behalf of any one who might be left as sole plaintiff in the action, as substantial justice requires. *Judgment reversed.*

ISRAEL F. TAPPAN *vs.* FREDERICK BURNHAM.

One who has gone upon an open beach and removed seaweed therefrom for a number of years, and during the same time has allowed other persons to enter upon it and remove seaweed, does not thereby acquire such a possession as will enable him to maintain an action for a trespass upon the same; especially against one who has entered under a license from the town, which, prior to the plaintiff's entry thereon, had been in possession of the same, and has never abandoned such possession.

The colonial grant of 1640, taken in connection with subsequent proceedings in 1642 and 1645, is sufficient to show that the title to the beach which was included therein vested in the town of Manchester; there being no evidence that the upland adjoining the beach was granted to any individual, prior to the colonial ordinance of 1647.

If, in an action to recover for breaking and entering the plaintiff's close, consisting of a beach and upland, it appears that the plaintiff has no sufficient title to the beach to enable him to maintain his action for a trespass thereon, and a general verdict is rendered for the defendant, a new trial will not be granted on exceptions, unless it affirmatively appears that the case was submitted to the jury under improper instructions in reference to his right to recover for a trespass upon the land to which he established a title.

TORT for breaking and entering the plaintiff's close in Manchester, consisting of upland and beach, and removing seaweed therefrom. The answer denied the plaintiff's title, and justified the alleged trespass under a license from the town of Manchester.

At the trial in the superior court, before *Vose*, J., the plaintiff's ownership of the upland was admitted; and he testified that at the time of the acts charged, in 1861, he was in possession of the beach described, and had been in possession thereof since 1847, supposing it to be his own; and that since then he had taken muck from it each spring and fall. He also testified on cross-examination that in 1823 he married the daughter of Benjamin Foster, who died in 1847; that he held the premises in the right of his wife in the estate of Benjamin Foster; that

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Benjamin Foster was the son of Samuel Foster, who bought the premises of one Babcock; that he took possession of the beach by going upon it and taking muck or seaweed therefrom; that he had been upon it many years before 1847, and had taken muck there, but after that time took it in much larger quantities; that he did nothing else on the beach, except to take muck; and that when there from 1847 to 1854 he has seen other persons take muck from the beach, in the same manner that he did, though not more than once or twice in a season.

The defendant was allowed, against the plaintiff's objection, to introduce evidence to show that, for about fifty years prior to the acts complained of, various persons had been in the habit, nearly or quite every year, of going upon the beach and taking away seaweed therefrom, without objection from anybody, and without claim of title or right of possession; that from 1787 to 1861 the town by various votes and acts assumed the ownership and control of the beach; and that they sold the right to take muck therefrom in 1837, and from 1858 to 1861. It also appeared that there is a wall, called the new wall, extending from one end of the beach to the other, and that between this wall and the low water there is for a part of the distance the foundation of an old wall, which was removed about fifty years ago. For the purpose of proving that the plaintiff owns only to the beach, the defendant was permitted to put into the case, against the plaintiff's objection, the deed of Thomas Babcock to Samuel Foster, dated in 1787, and referred to by the plaintiff on cross-examination, in which the granted premises were described as bounded on the south "on land or the beach called Black Cove." There was much evidence as to the precise place where the acts of the defendant were done; and the defendant produced a license from the selectmen of Manchester to go upon the beach and take away seaweed in 1861. The defendant was also allowed, under objection, to introduce in evidence several reports of committees appointed by the town to lay out and renew the bounds of the public landing-places, and the roads to the same, for the purpose of proving title in the town, and of

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showing that the town and the owners of the upland had agreed upon a conventional division line between them, different from the ordinary high water mark.

As further evidence of the town's title to the beach, the defendant was allowed, under objection, to put in evidence the following records: 1. A copy of a petition in 1640, taken from the town records. "Wee whose names are subscribed, belonging to the church & town of Salem, being straitned in our accomidations so that we are not able comfortably to subsist, having advised and taken councell about our present estate and condition, it being judged fitt & free liberty being granted us to remove, & no place being soe convenient for our easy removall as Jeffreyes Creek lying soe near us, & most of us having some small quantity of ground allowed to us there already, do therefore joyntly and humbly request the hon^ed court to give us power to erect a village there, and to allow us such enlargement thereabouts as is not granted to any other plantation. Thus leaving our request to y^r wisdom & consideration, with our prayer for a blessing from heaven on y^re & proceedings, wee rest y^re humble petitioners." 2. Copies from the records of the general court.

"At a Generall Court of Elections, held at Boston, the 13^th of the 3^th M^o, @ 1640. . . . . The petition of the inhabitants of Salem for some of their church to have Jeffryes Creeke, & land to erect a village there, for M^r Willi: Walton, John Blacke, Willi: Allen, Sam: Orchard, Geo: Norton, &c. comp^a; what land & inlargment may bee convenient, & is not granted to any other plantation, is granted them; & it is referred to M^r John Winthrope, Innior, & M^r Symon Bradstreete, to settle the bounds of the said village." 1 Col. Rec. 288.

"A Gen^rall Co^rt, held at Boston, the 7^th Day of the 8^th M^o; 1640. . . . . M^r John Winthrope, Iuni:, M^r Symon Bradstreete, M^r Ema: Downinge, M^r Hauthorne, & M^r Tynge, or any three of them, are appointed to set out the bounds between Ipswich, Jeffryes Creeke, & Cape Ann, & to certify to the next Courte." 1 Col. Rec. 304.

"3^th 3^th m^o, 1642. Wee, whose names are under written, have

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determined and agreed w^th^ the consent of Ipswich, Cape Ann, & Jefferies Creeke, that their bounds shall lye as followeth: That all the land lyinge between Ipswich & Cape Ann meeting house shall be divided, 6 miles to Ipswich & 4 miles to Cape Ann, where there are 10 miles, and so by proportion where less, — that is, by fifths, 3 parts to Ipswich for 2 to Cape Ann, — & where there is more than 10 miles, the remainder to lye to Jefferies Creeke, and this to be measured before the next Generall Court. William Hauthorne, Edward Hollioke, Matthew Boyes." 2 Col. Rec. 4.

"At a Co^rt^ of Election, at Boston, the 14^th^ of the 3^th^ Month, @ 1645. . . . . It is ordered, y^t^ Jeffryes Creeke shal be called Manchester." 2 Col. Rec. 109.

After all the evidence was in, the judge stated that the evidence did not in his judgment show such an exclusive possession of the beach by the plaintiff, as against the defendant, as would enable him to maintain an action against the defendant for any acts done thereon, and that the questions to be submitted to the jury were, whether the defendant took muck above the ordinary high water mark, if that was found to be the line of division between the parties; or, if the parties had adopted a different line of division, then whether the defendant took muck above such line; and that it would be submitted to the jury to determine whether such line had been adopted; and he instructed the jury that the burden of proof was on the plaintiff to show where the alleged acts of trespass were committed; that, upon the evidence, the plaintiff owned to the ordinary high water mark, unless he and those under whom he claimed, and the owners of the beach, had adopted a different division line between them; that if such line had been adopted and assented to, then the plaintiff owned to that line, and could recover for any act of trespass above it; that upon the evidence the plaintiff had no such exclusive possession of the land below such division line as would enable him to maintain an action for acts of trespass done thereon by the defendant; and that the proceedings of the town for more than sixty years prior to 1847, assented to by the plaintiff and by those under whom he claims,

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are evidence that the town was in exclusive and notorious possession of the beach, claiming title, during that time, and owned the fee of the beach in 1847.

Various other questions were raised during the trial, which ultimately became unimportant. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

J. C. Perkins, (*D. P. Kimball* with him,) for the plaintiff.

S. H. Phillips & J. A. Gillis, for the defendant.

Bigelow, C. J. The bill of exceptions in this case is very long, and contains much matter which is not relevant or material to the questions which were submitted by the court to the jury, and on which the decision of the case by them ultimately turned. In the aspect which the controversy finally assumed, under the ruling of the court, many of the objections taken by the plaintiff in the course of the trial became wholly unimportant. It seems to us that there are now only three points on which it is necessary for us to express an opinion.

1. The first arises on the ruling, made after all the evidence had been put in, that it did not appear that the plaintiff had such an exclusive possession of that portion of the *locus* lying below the line of ordinary high water mark, and constituting the beach in controversy, as to enable him to maintain an action of trespass for any act done thereon by the defendant. We see no reason to doubt the correctness of this view of the case, as it is disclosed by the evidence reported in the exceptions. It seems to us to be well supported on two grounds. In the first place, the evidence falls short of showing that the beach or any part thereof could in any just or legal sense be deemed the plaintiff's close. He does not show any exclusive, separate right in the soil, or any exclusive possession thereof. The premises were open and uninclosed. The tide ebbed and flowed over them twice every twenty-four hours. The plaintiff exercised no acts of ownership over them, and had no possession of them except to take muck or seaweed therefrom when it was thrown up by the action of the winds and waves. Besides, it appeared that during the whole period of the plaintiff's alleged possession and occupancy, and long prior thereto, many other persons had done similar acts

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on the premises in controversy. But there was no evidence that the plaintiff ever claimed to own the soil. He did no act and made no claim except to go on and take the drift weed. It was not shown that he ever forbade others from exercising the same right. It seems to us that such temporary and occasional occupation of a shore or beach, without any proof that it was separate and exclusive, was insufficient to support the allegations in the plaintiff's declaration.

But there is a better and more decisive answer to the claim of the plaintiff to maintain this action. The defendant justifies his entry under a license from the town of Manchester. Upon the uncontradicted evidence in the case, it appears that the town was in possession of this beach, exercising acts of ownership and claiming the right to dispose of the seaweed or muck thereon, as early as the year 1837, long before the plaintiff's alleged possession and occupancy commenced. There is no evidence in the case to show that this possession by the town was ever relinquished or abandoned. The legal presumption, in the absence of proof to the contrary, is that it continued. And there was much evidence in the case which tended to show that the right of the town to the beach and to the drift weed which accumulated thereon was not only not waived or given up, but was continued and asserted up to the time of the commencement of this action. In this state of the evidence, the most favorable view which could be taken of the plaintiff's case was, that his possession was a mixed and concurrent one with that of the town. When he entered in 1847, the town were in possession of the premises. There is no pretence that his possession then became exclusive. The case, therefore, clearly comes within the principle, that where two parties have a concurrent or mixed possession of land, neither having other title or exclusive priority of possession, one of them cannot maintain an action of trespass against the other. *Brimmer* v. *Proprietors of Long Wharf*, 5 Pick. 131, 135. *Barnstable* v. *Thacher*, 3 Met. 239. The defendant could not be regarded as a stranger who had entered in violation of the right of the town as well as of the plaintiff. Under his license from the town, he had the

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right of one holding a common occupation and possession with the plaintiff.

2. So far as a title to the beach in controversy was shown by documentary proof offered at the trial, it seems to us to be now vested in the town of Manchester. By the records of the general court, it appears that on the thirteenth day of May 1640, 1 Col. Rec. 288, the following vote was passed: "The petition of the inhabitants of Salem for some of their church to have Jeffryes Creeke, & land to erect a village there, for Mr Willi: Walton, John Blacke, Willi: Allen, Sam: Orchard, Geo: Norton, &c. compa; what land & inlargment may bee convenient, & is not granted to any other plantation, is granted them; & it is referred to Mr John Winthrope, Iunior, & Mr Symon Bradstreete, to settle the bounds of the said village." By subsequent votes and proceedings of the general court, to be found in 1 Col. Rec. 304, and 2 Ib. 4, 109, it appears that the territory included in the foregoing grant is the same as that now embraced in the town of Manchester. Looking at the terms of the vote, we think it clear that it was not a mere cession of jurisdiction or corporate authority to the person designated, over the territory therein named. It is in terms a grant of "land and inlargment" to divers persons and their associates, not to be held by them in severalty, but to them as proprietors, an aggregate body formed for the purpose of establishing a plantation or settlement, or, in the words of the petition, "to erect a village." It was in effect a grant to a proprietary, having certain corporate powers of a limited nature, by which they were enabled at the outset to manage, divide and alienate the lands amongst themselves, or to grant them to new settlers, and which subsequently, by usage or express grant, became enlarged into full municipal authority. This was the construction put on a similar vote of the general court in *Commonwealth* v. *Roxbury*, 9 Gray, 451, 496. And although the grant in this case preceded the colony ordinance of 1641–1647, Anc. Chart. 148, by which it was enacted that the proprietor of land adjoining "creeks, coves and other places about and upon salt water, shall have propriety to the low water mark" to the extent of one hundred rods, yet on the

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passage of that ordinance the land in controversy became annexed to the upland, so that it enured to the benefit of the town. *Commonwealth* v. *Roxbury*, 9 Gray, 498. It did not appear at the trial that the title to this beach, which thus became vested in the town of Manchester, had ever been alienated or lost. In the absence of evidence, the legal inference is that it continued in the town. And there was evidence in the case which tended very strongly to confirm this inference. On this point, the deed of the adjoining upland from Thomas Babcock to Samuel Foster in 1787, by which the land granted is bounded "on land or the beach called Black Cove," thus excluding the grantee from any right below ordinary high water mark, was competent and significant evidence, in connection with the fact that no conveyance of the beach by the town was shown to have been made, that the title to it had never passed out of the town.

3. In the view which we have taken of the nature of the plaintiff's possession of the beach, and of the title of the town to the land below ordinary high water mark at the place in controversy, the court did not err in ruling that the only question to be determined by the jury was, whether the defendant took seaweed from the upland belonging to the plaintiff, or from a portion of the beach which, by the establishment of a conventional line between the town and the owner of the upland, might be deemed to belong to the plaintiff as part of his upland, because it was above the line fixed by the parties as the line of ordinary high water. If the jury found this fact in favor of the plaintiff, he was entitled to a verdict; and it was the only ground on which this action could be supported. That it is competent for adjoining owners to establish a line by agreement as the boundary of their estates, which shall be binding on them and those claiming under them, is too well settled to admit of a doubt. Whether any such agreement was proved in the present case, we cannot determine on this bill of exceptions, which does not purport to contain a statement of all the evidence introduced at the trial on this point. Nor can we see that the case was submitted to the jury under instructions which precluded the plaintiff from obtaining a verdict, if the evidence satisfied them

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either that the defendant entered on the upland above the actual line of ordinary high water, or above the conventional line, if such line was proved to have been fixed and agreed on by the adjoining proprietors of the upland and beach.

Exceptions overruled.

NATHANIEL IRELAND, JR. *vs.* CITY OF NEWBURYPORT

If the municipal authorities of a town have provided supplies for distribution among those out of the almshouse who need relief, upon orders of the overseers of the poor, and have given notice thereof to the overseers, the latter have no authority to contract debts in behalf of the town for the support of the poor; and one who, having knowledge of the facts, furnishes supplies to persons settled in such town, upon orders of the overseers, cannot maintain an action against the town to recover for the same. But if he furnishes supplies upon such orders to persons settled elsewhere, he may recover from the town the amount actually received by it, on account of such supplies, from the towns which were liable to support the persons who were relieved thereby.

CONTRACT brought to recover for goods sold and delivered.

It was agreed, in the superior court, that the plaintiff furnished goods, to the amount and of the value alleged in his declaration, upon the written orders of the overseers of the poor of Newburyport, at various dates between August 23, 1862, and the date of the writ. The goods were supplied to persons needing relief, who were not supported in the almshouse. Prior to that time, the city council of Newburyport had provided a sufficient quantity of supplies for distribution among such persons, to be delivered on the orders of the overseers of the poor, and on the 7th of July 1862 passed an order, the mayor and aldermen concurring, authorizing the purchase and distribution thereof, and on the 18th of the same July passed another order, the mayor and aldermen concurring, for giving notice to the overseers that provision had been made for furnishing all the supplies necessary for that purpose, to be delivered upon their orders. A copy of these orders was delivered to each of the overseers, at or about their respective dates, and the same were also published in a newspaper, with a notice that no debts against the city,

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contracted by the overseers or either of them, would be allowed by the city. The plaintiff had personal knowledge of this notice.

It was also agreed that the defendants have received from other cities and towns nineteen hundred dollars for supplies furnished during the year 1862 to paupers settled elsewhere, and that a part of the supplies for which said money was received was furnished by the plaintiff, and is included in the amount sought to be recovered in this suit.

Upon these facts, judgment was rendered for the plaintiff and the defendants appealed to this court.

C. Cushing & J. N. Pike, for the defendants.

S. B. Ives, Jr., for the plaintiff. The Gen. Sts. *c.* 70, § 2, give to overseers of the poor the entire authority to determine the manner in which paupers shall be relieved and supported. These overseers had the same authority as ordinary overseers. *St.* 1851, *c.* 296, § 11. By the true construction of Gen. Sts. *c.* 70, § 2, the city or town have only the authority to determine whether they will or will not maintain a workhouse. If a city council may decide what kind of supplies shall be furnished to those out of the almshouse who need relief, they may also determine the amount to be given in any case, and prohibit the furnishing of supplies to particular persons; that is, they may decide who is and who is not a pauper. It is no answer to this action to say that the supplies provided were suitable in kind and quantity. It appears that the overseers thought otherwise. Shall the plaintiff in this action try the quality of the groceries provided by the city?

By the Court. We are of opinion, upon a comparison of the 22d and 70th chapters of the General Statutes, that the orders of the common council of the city of Newburyport, passed on the 7th and 18th of July 1862, were well authorized, and that the authority of the city overseers of the poor to contract city debts for support of the poor (if such authority previously existed) was thereby terminated. As those overseers, and also the plaintiff, had notice of those orders, they must abide by the consequences which follow the passing of them. For

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the goods furnished by the plaintiff, on the overseers' orders, he has no legal claim on the defendants. But for the amount of money which the defendants have received for supplies furnished to paupers having settlements elsewhere, which supplies were obtained from the plaintiff on orders of the overseers, we think he is entitled to recover. The amount thereof, if not agreed on by the parties, nor submitted to an assessor, will be ascertained by a jury.

HERMAN E. DAVIDSON *vs.* JAMES R. NICHOLS & another.

A declaration in an action of tort, which alleges that the plaintiff through his agent procured the defendants to furnish and deliver to him a certain article, and that they negligently and carelessly furnished a different article, and that he sustained an injury by the use of the article furnished, believing it to be that which he ordered, is not sustained by proof that the plaintiff bought the article of a third person who obtained it of the defendants.

HOAR, J. The declaration in this case is in tort; but it sets forth a tort founded upon a breach of contract. It alleges that the plaintiff, through his agent, procured the defendants to furnish and deliver to him a certain article, and that the defendants negligently and carelessly furnished a different article; and that the plaintiff sustained an injury by the use of one for the other. The answer denies that the defendants furnished anything to the plaintiff, or had any dealings with him. The proof was that the defendants sold to D. D. & A. Geyer, and that the plaintiff bought of them, the package in which the wrong article was put up. This was clearly a variance; and so it was held on the trial. Whether, upon the facts stated, the plaintiff might not have a good cause of action, with proper averments, we do not intend to intimate. But the manner in which the declaration is framed would preclude inquiry into circumstances which might become very material in determining the liability of the defendants upon the real facts of the case. Upon the pleadings, the question whether the Geyers used due care, for example, in their sale to the plaintiff, would not be in issue. The

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ruling of the court having been upon the variance between the allegations and the proof, and being entirely correct, there must be *Judgment on the verdict for the defendants.*

S. H. Phillips, for the plaintiff, cited *Scott* v. *Shepherd*, 2 W. Bl. 892; *Thomas* v. *Winchester*, 2 Selden, 397, 405, and cases cited; *Lobdell* v. *Baker*, 3 Met. 471; *Guille* v. *Swan*, 19 Johns. 381; Bul. N. P. 25.

S. B. Ives, Jr., for the defendants, cited *Phillips* v. *Wood*, 1 Nev & Man. 434; *Longmeid* v. *Holliday*, 6 Eng. Law & Eq. R. 562.

WINTHROP W. CHENERY *vs.* NATHANIEL WEBSTER & another.

The receipt, by an administrator, of the avails of real estate of his intestate, sold for payment of debts after the expiration of two years from the date of his bond, is not a receipt of new assets which will authorize a creditor thereafter to commence proceedings against him to recover his debt, under Gen. Sts. *c.* 97, § 6.

APPEAL from a decree of the judge of probate dismissing a petition praying that the respondents, as administrators of the estate of Nathaniel R. Webster, might be ordered to pay to the petitioner the amount of a claim held by him against said estate. It was agreed that after the expiration of two years from the date of their bond the respondents, by leave of the probate court, sold land of the intestate for the payment of debts, and that the petitioner commenced no proceedings to recover his claim until after that time. The case was reserved by *Hoar*, J. for the determination of the whole court.

H. Gleason, for the appellant.

C. P. Thompson, for the appellees.

METCALF, J. As the appellees gave due notice of their appointment as executors of the will of their testator, and the appellant did not, within two years from the time of their giving bond, commence a suit against them on his claim upon the testator's estate, he cannot now hold them to answer to such suit,

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unless assets of the deceased came to their hands after the expiration of said two years. Gen. Sts. *c.* 97, §§ 5, 6. And the agreed facts do not show that any assets have, within the meaning of the statute, come to their hands since that time. They have since that time received the proceeds of the testator's real estate, sold by them for payment of his debts, under a license from the judge of probate. That estate was included in the inventory which the appellees returned to the probate court, and was assets, (so much of it as was necessary,) for the payment of the deceased's debts, from the time of his decease; and the appellees were bound to apply for leave to sell it, if a sale thereof was necessary for that purpose, and would have been answerable on their bond for failure so to do.

The construction of these words of § 6 of *c.* 97 of the Gen. Sts., viz: "When assets come to the hands of an executor or administrator after the expiration of two years," has been adjudged in the case of *Sturtevant* v. *Sturtevant*, 4 Allen, 122. It was there decided that these words obviously mean assets for which the executor or administrator has not been previously liable, and not merely the shape which existing assets, with which he has already been charged, may assume; that money received after two years, upon the sale of property that was assets, is not within the meaning of § 6, in the latter clause of which the assets named in the former clause are termed "such new assets." The same construction of that section must be given in the present case. See also *Veazie* v. *Marrett*, 6 Allen, 372.

By *St.* 1861, *c.* 174, § 2, the appellant may apply to this court by a bill in equity, setting forth all the facts, and if the court shall be of opinion that justice and equity require it, and that he is not chargeable with culpable neglect in not bringing his suit within the time limited by law, they may give him judgment against the estate of the deceased for the amount of his claim. This, so far as we know, is his only legal resource.

Decree affirmed.

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CHARLES MINOT *vs.* LEONARD SAWYER.

In a suit to foreclose a mortgage, the mortgagor is entitled to the benefit of the statute penalty for usury in reduction of the sum for which conditional judgment is entered. No deduction, however, is to be made for usury paid under a verbal agreement, which is not incorporated into the written contract.

If, in a suit to foreclose a mortgage, a deduction is made, in entering conditional judgment, from the sum payable by the terms of the contract, on account of usury, the defendant is entitled to recover his full costs.

WRIT OF ENTRY prosecuted by the executor of the will of Stephen Minot, to foreclose a mortgage. The defendant was defaulted in the superior court, and moved that conditional judgment should be entered.

It was agreed that the mortgage was executed on the 17th of February 1852, to secure a note for $600, of that date, signed by the defendant and payable in one year with interest. On that day the defendant borrowed $600 of Stephen Minot, and orally agreed to pay him twelve per cent. interest thereon for the first year, and nine per cent. per annum thereafter. Immediately after receiving the money, he paid back thirty-six dollars, said Stephen having required so much to be paid in advance. Afterwards he paid various sums for interest at the rate of nine per cent. per annum. It was agreed that upon these facts, so far as the same would be competent to be proved in evidence, the court should render judgment according to law, and also determine the question of costs; and conditional judgment was accordingly entered for the plaintiff for $643.50, and judgment for the defendant for his costs. The plaintiff appealed to this court.

C. P. Judd, for the plaintiff.

S. B. Ives, Jr., for the defendant.

DEWEY, J. The conditional judgment in an action to foreclose a mortgage fixes the amount of the indebtedness secured thereby, and hence this action opens any proper matter of defence to the validity of the note in whole or in part. *Vinton* v. *King*, 4 Allen, 564. *Burke* v. *Miller*, 4 Gray, 114. The defence

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of usury, and the right to have a deduction of three times the amount of the unlawful interest reserved or taken, is not confined to an action of contract upon the note, but is equally applicable to the case of a bill by the mortgagor to redeem, or an action by the mortgagee to foreclose the mortgage. *Hart* v. *Goldsmith*, 1 Allen, 145.

The facts in the present case clearly establish a usurious contract. The maker of the note did not receive $600, but only the sum of $564. There was, therefore, directly secured by the original contract, now sought to be enforced, the sum of thirty-six dollars for unlawful interest. The interest upon that sum must be computed down to the day when the judgment was entered, from which the appeal was taken to this court, (the judgment of the court taking the place of a verdict of the jury,) and threefold the amount of thirty-six dollars, and of the interest on the same, as above stated, will be the amount to be deducted from the note, as the forfeiture on account of usurious interest.

But subsequent payments of unlawful interest, in pursuance of any verbal contract to pay the same, are not subject to be deducted from the note. For such payments, the remedy is in another form, either by an action of contract or by a suit in equity. *Drury* v. *Morse*, 3 Allen, 445. *Butterfield* v. *Kidder*, 8 Pick. 512.

The further question is, as to the proper order as to costs, in a case like the present. It is said, on the part of the plaintiff, that this is in the nature of a real action, and not an action upon the promissory note, and that the plaintiff, having maintained his action, is the prevailing party, and, under the general provisions of law, is entitled to his costs.

But the court are of opinion that, as the right to maintain an action to foreclose a mortgage does directly involve the question of the indebtedness of the defendant to the plaintiff, and as to sustain his claim to a conditional judgment the plaintiff must establish such indebtedness, where such debt or liability is tainted with usury, the course of proceedings and the rule as to costs must be the same as if the party had brought his action directly

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on the contract. As already remarked, this judgment is conclusive as to the amount legally due on the note. The defendant is compelled to raise the question of usurious interest in this suit, or be estopped from claiming the deduction hereafter. Now the statute having provided that, whenever in an action brought upon such contract it appears that a greater rate of interest than is allowed by law has been reserved, taken or received, the defendant shall recover his full costs, we think that this provision applies to an action where a usurious contract is sought to be enforced by an action to foreclose the mortgage given to secure the contract, as well as where the action is brought directly upon the contract. Indeed, the fact of allowing the deduction of the forfeiture for taking usurious interest in an action to foreclose the mortgage seems necessarily to assume that such suit is really an action brought on the contract itself. The order as to costs will be, therefore, that the defendant is to recover his full costs.

SAMUEL P. FOWLER & others *vs.* SELECTMEN AND TREASURER OF DANVERS.

The *St.* of 1863, *c.* 38, does not legalize a vote of the inhabitants of a town to pay money to persons who had already enlisted in the service of the United States.

BILL IN EQUITY by ten tax-payers of Danvers, setting forth that on the 11th of September 1862 the inhabitants of the town passed the following vote in town-meeting: "Voted, that the town of Danvers pay a bounty of one hundred and twenty-five dollars to each person, a resident of the town, or his legal representative, who has enlisted in the United States service for three years or the war, who has not already received a bounty from the town, provided said person has served nine months, or has been earlier discharged on account of injuries received in such service; said bounty to be payable at the end of said volunteer's service."

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That on the 8th of August 1863 the inhabitants of the town in town-meeting passed a vote appropriating a sum not exceeding fifty thousand dollars to meet the expenditure contemplated by the above vote, and authorizing the treasurer to borrow from time to time such sums of money as might be necessary to pay the said bounty, as the same should become due, and be demanded by the persons entitled thereto; that accordingly certain persons coming within the terms of first vote have demanded of the defendants payment of the bounty so voted; and that the purpose for which the appropriation was made is illegal. The prayer was for an injunction, prohibiting the borrowing or payment of any money under said vote, and for other and further relief.

The defendants filed a general demurrer, and the case was reserved by *Dewey*, J. for the determination of the whole court.

S. B. Ives, Jr., for the defendants. The words of *St.* 1863, *c.* 38, are broad enough to include the present case. At the time of its passage, every town in the state had voted bounties to volunteers. Questions had been raised as to the legality of such action, and this statute was passed to settle these questions. What is a bounty? The very force of the word signifies a gift, and negatives the idea of a consideration, in the legal sense of the word. The town received no consideration for the bounties offered to the future volunteers. In its corporate capacity, it had no duty to perform in raising men to fill its quota. The inhabitants of Danvers have seen fit to do an act of simple justice to those of their citizens who volunteered in the early part of the war, from motives of patriotism and without the promise of bounty; and they consider that the statute sanctions their act.

No question arises as to the consideration of the promise. This case is not to be decided upon the same principles as if it were an action brought against the town by some one of the persons named in the vote. In such an action, the question of the validity of these votes as a contract might arise. Independently of the statute, the objections would be that the vote was not within the range of municipal powers. If the statute relieves the case of that difficulty, the petitioners can only avail

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themselves of the objection now under consideration when they can induce the town to defend a suit brought by one of the volunteers for this bounty.

W. G. Choate, for the plaintiffs.

BIGELOW, C. J. On a first reading of *St.* 1863, *c.* 38,* on the construction of which the decision of this case depends, its language seems to be equivocal and ambiguous, and to furnish room for a very plausible argument in support of the interpretation on which the defendants insist. But on a careful consideration of the terms of the act, and construing them in the light of the circumstances to which it is well known the enactment owes its origin, and the manifest purpose which it was designed to accomplish, we are led to the conclusion, entirely clear and satisfactory to our own minds, that it cannot be justly interpreted in such manner as to authorize and give validity to the votes of the town set out in the petition, or to sanction the expenditure of the money of the town or the use of its credit for the purpose alleged to be contemplated by the defendants.

Prior to the passage of the statute under consideration, and at the time when the vote of the town of Danvers set out in the petition was passed, on the 11th day of September 1862, towns in their corporate capacity had no authority to raise or appropriate money for the payment of bounties or other compensation to soldiers enlisting in the service of the United States, except to defray expenses and fulfil contracts incurred or entered into, as provided in *St.* 1861, *c.* 222, § 2, prior to the 23d day of May 1861, the day on which the last mentioned statute went into operation. Indeed, any expenditure or appropriation for such purpose, other than therein expressly authorized, was prohibited by the third section of the same act. But notwithstanding such want of authority, and in the face of this express prohibition

* This statute is as follows: "The acts and doings of cities and towns in paying or agreeing to pay bounties and recruiting expenses for soldiers already furnished by them, upon the requisition of the United States, and upon the call of the governor, for the present war, together with taxes that have been or may be assessed, and payments and obligations that have been or may be made or given by them for those objects, are hereby ratified, confirmed and made valid."

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under the urgent necessity of calls for troops from the national and state authorities, many of the municipal corporations in the Commonwealth during the year 1862 had proceeded to vote and raise large sums of money for the purpose of holding out inducements in the form of bounties and increased pay to persons to fill up the quotas of volunteers assigned to such cities and towns respectively. In pursuance of these votes and appropriations, not only had money already on hand been expended, but contracts had been entered into for the payment of bounties to volunteers, and also for the loan of large sums on the credit of towns which had been disbursed for recruiting purposes. So great was the exigency, and so unanimous was the consent of all persons to meet it promptly, that not in a single instance, so far as we know, was any attempt made to defeat such appropriations or prevent such payments by legal process, although the action of the towns and cities in thus raising and expending money was clearly illegal. This was the state of things which existed at the close of the year 1862, and at the time the legislature assembled in January 1863. One of the earliest of the general laws passed at this session was the statute under consideration, entitled "An act to legalize the doings of towns in aid of the war." In view of these facts, we cannot entertain a doubt as to the intention of the legislature in passing this statute. A necessity had arisen for the expenditure of money by towns, which had not been anticipated or provided for by previous legislation, and which was occasioned by an unforeseen emergency, by which a duty in its nature public and patriotic had been imposed on the inhabitants of towns. Sound policy and a due regard to the welfare and interests of the people of the Commonwealth required that the action of cities and towns, undertaken under such circumstances, should be sanctioned and made valid by legislative enactment. But further than this it was not wise or expedient to go. As the unlawful contracts or unauthorized expenditures were the result of necessity, that very necessity furnished the appropriate limit beyond which legislative sanction to illegal appropriations and agreements should not be extended. And this we think is the limit which the legislature

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designed to fix. They intended only to make valid all votes or expenditures of a town or city which were in furtherance of the great purpose of obtaining volunteers to fill up the calls made on the state, and complete the quotas which had been assigned to the several towns. So much was demanded by the public exigency under which towns had acted in raising and appropriating money. But it was not essential to the great public object which had given rise to this exigency, or in any way promotive of it, that bounties or gratuities should be paid to those who had previously enlisted in the army of the United States, and were already engaged in the public service. Such an expenditure of money might be generous, and even just; but it was not necessary, or required by considerations founded in a wise and sound policy.

This interpretation of the statute, drawn from the circumstances under which it was enacted and the manifest purpose it was designed to accomplish, is fully supported by a just interpretation of the language in which it is expressed. Looking to this only, we find that the declared object of the statute is to ratify, confirm and make valid "the acts and doings of cities and towns in paying or agreeing to pay bounties and recruiting expenses for soldiers already furnished by them." This is equivalent to an enactment that payments and agreements for the payment of bounties and expenses by means of which soldiers have been so furnished shall be held valid. Of itself, the word "bounty," according to the more common and received usage of the language as applied to the subject matter, signifies money paid or a premium offered to encourage or promote an object, or procure a particular act or thing to be done. Such is the meaning attributed to it in dictionaries of approved authority, when used in connection with the enlistment of soldiers. But if its signification, standing by itself, might be deemed to be equivocal or doubtful, it is made quite clear by the context. It is coupled with the phrase "recruiting expenses," which *ex vi termini* can only be applied to costs and charges which had been incurred in procuring or enlisting troops for future service, and could have no reference to expenditures for or on account of

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those who had previously enlisted and were already in the army Taking the sentence together, it clearly indicates an intention to ratify and confirm those acts and doings which had been found necessary to enable towns to raise troops, and not those which were designed only to give a gratuity or furnish an additional compensation to soldiers who had entered service without any inducement in the way of bounty or enhanced pay. It is not reasonable or according to any just canon of exposition to suppose that two objects of an entirely distinct and independent nature were embraced in the same clause. The maxim of Lord Bacon, *Copulatio verborum indicat acceptationem in eodem sensu*, is a safe and sound rule in the construction of doubtful phrases and sentences; and, unless there is something to indicate a different intent, it is fair to presume that a word in question and those which surround it or immediately follow it are designed to be *ejusdem generis*, and referrible to the same subject matter, or to be interpreted in a similar sense.

Nor does it seem to us to be too great a refinement on the use of words, or to partake of hypercriticism, to observe that the bounties and expenses which the framers of the statute intended to embrace within its provisions are those paid or agreed to be paid "for," and not to, soldiers; indicating, as we think, payments or contracts made to procure soldiers, and not those which were designed to furnish rewards or gratuities to those already in the service. It may be added, that the title of the act tends to confirm this construction. A payment of money as a bounty to induce a person to enlist as a soldier is an act "in aid of the war," because it tends to increase the ranks and add to the strength of the army in the field. But it is difficult to see in what way any effective support or assistance is furnished "in aid of the war" by giving increased compensation to those who are already enlisted, and whose services as soldiers are already pledged to the government.

For these reasons, we are of opinion that the petition sets out sufficient cause for an interposition by this court to prevent an illegal and unauthorized expenditure of money by the defend ants, and that a decree must be entered that the

Injunction be made perpetual.

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JONATHAN W. PEELE *vs.* WILLARD P. PHILLIPS.

The *St.* of 1862, *c.* 218, § 3, providing that no stockholder or officer in a manufacturing corporation shall be held liable for its debts or contracts unless a judgment is recovered against it, &c., applies to manufacturing corporations organized under general laws, as well as to those which have special charters.

THE declaration in this case contained counts in contract and in tort, with an averment that they were for the same causes of action, setting forth that the defendant and others associated themselves together as a corporation under the name of the St. Maurice Lumber Company, under the provisions of *Sts.* 1851, *c.* 133, and 1855, *c.* 478; that in 1856 the defendant became the treasurer of the company, and that in that year the corporation, by the defendant as treasurer, executed three several promissory notes payable to the order of the defendant as treasurer, and indorsed by him to the plaintiff, amounting together to $20,000, which notes are still due; that the officers of the corporation neglected and refused to comply with the provisions of the statutes aforesaid, or of Rev. Sts. *c.* 38, §§ 17, 18, and that the capital stock of the corporation was never paid in, whereby, by *St.* 1851, *c.* 133, §§ 10, 11, the officers are jointly and severally liable for the corporate debts contracted during such neglect. The writ was dated December 31, 1862. The defendant filed a general demurrer, and thereupon the case was reserved by *Dewey*, J. for the determination of the whole court.

W. G. Choate, (*J. A. Gillis* with him,) for the defendant.

S. B. Ives, Jr., (*G. Wheatland* with him,) for the plaintiff.

MERRICK, J. This is an action to recover the contents of three promissory notes, made by the St. Maurice Lumber Company, and held by the plaintiff. The notes were not paid at their maturity, and still remain due. The St. Maurice Lumber Company is a manufacturing company, and was established under the general laws of the Commonwealth, and is not chartered by any special act of incorporation. The defendant, at the time of the making of the note declared on, was, and has ever

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since been, a member and the treasurer of the corporation. The declaration alleges that the capital stock of the company has never been paid in, and that its officers neglected and refused to comply with the provisions of the statutes under which it became incorporated, and thereby made themselves jointly and severally liable for the payment of its debts. To this declaration the defendant demurred.

It is now provided by statute that no stockholder or officer in a manufacturing corporation shall be held liable for its debts, unless a judgment is recovered against it, and the corporation shall neglect, for the space of thirty days after demand made on execution, to pay the amount due, with the officer's fees, or exhibit to him real or personal estate of the corporation, subject to be taken on execution, sufficient to satisfy the same, and the execution shall be returned unsatisfied. In this contingency and event, the judgment creditor, or any other creditor, may file his bill in equity in behalf of himself and all other creditors of the corporation, against it and all persons who were stockholders therein at the time of the commencement of the suit in which such judgment was recovered, or against all the officers liable for its debts, for the recovery of the sums due from the corporation to himself and its other creditors, for which the stockholders or officers are personally liable. And suitable and proper decrees may be entered therein against the respective parties according to their several liabilities. *St.* 1862, *c.* 218, §§ 3, 4, 5. This, therefore, is now the only remedy which a creditor of any manufacturing corporation can have for the recovery from its stockholders or officers of any debt for which they may be liable, if such corporations established under general laws, and not incorporated by a special statute, were intended to be referred to in, and are to be affected by, its provisions.

There is nothing in any provision of this statute which expresses an intention to create or establish a discrimination as to the liability of, or the mode of proceeding against, the stockholders or officers of corporations organized under particular acts of incorporation, and those in which parties associate themselves together for the same or the like purpose under the

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general laws. They are equally manufacturing corporations, whether their authority to act is derived from one source or the other. And in the earliest statute on the subject it is enacted, in express terms, in respect to joint stock companies, that when persons associated together have organized in conformity to the requirements of the statute, they shall thereupon become a corporation, with all the powers and privileges, and subject, with a single exception, for which there is otherwise an equivalent provision, to all the duties, restrictions and liabilities, which attach to corporations established by special acts of legislation. *St.* 1851, *c.* 133, § 5. Gen. Sts. *c.* 61, §§ 1, 5. Being thus substantially alike, both in respect to privilege and responsibility, there is no reason why general terms which are equally applicable to both should be construed as referring to one rather than to the other class of these corporations. The declared object and purpose of the statute of 1862 were to define the liabilities of officers and stockholders, and to provide a certain, uniform and convenient mode of enforcing them, so that the rights and claims of all creditors should be secured and adjusted in a single suit. And when the liability and the occasion for a remedy are exactly the same, nothing but the most explicit language to that effect should restrict provisions which in terms are equally applicable to both classes of corporations, to those having their origin in special charters rather than in and by force of the general law.

It has been urged by the plaintiff that, upon this construction, there are material changes effected in relation to the liabilities of officers, by which they are in some instances diminished and in others increased; and that these have a tendency to show that *St.* 1862 was not intended to be applicable to the stockholders and officers of corporations organized under general laws. But even if any such material changes were or would be made in respect to such corporations by giving the statute a construction which makes it applicable only to one class of them, that would not afford a sufficient reason for rejecting plain and positive provisions; for it is competent to the legislature to ordain such changes at its pleasure. But in fact the plaintiff

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has wholly failed to substantiate the ground of his objection. In all the instances which he has enumerated in which the officers of chartered corporations would, by force of the provision of Gen. Sts. *c.* 60, become liable, those of the other class would also, with the single exception before referred to, in like manner equally be liable. Gen. Sts. *c.* 61, § 5. Officers of the last mentioned class of corporations are not and could not be affected by the provisions of Gen. Sts. *c.* 60, § 23, for they were expressly excepted from its operation. *St.* 1862, *c.* 218, § 2. But now the stockholders in both classes of corporations are put upon the same footing and under the same liability, which seems to be a perfectly just and equitable arrangement. Under Gen. Sts. *c.* 61, § 11, the officers were made liable for the debts of the corporation on account of the omission of the associates to state in their articles the purpose for and the place within which the corporation was established, or of their omission to perform their own duties in respect to the certificate provided for in the eighth section. From the penalty for the non-performance of these duties they are exonerated by the provision of the statute; a change of some importance to the officers, but which cannot be considered sufficient to control the provisions of the statute and give it an interpretation to which its language is not otherwise entitled. Giving effect, therefore, to the plain and positive rule established by the more recent statute, it is very certain that this action cannot be maintained.

Demurrer sustained.

JONATHAN W. PEELE *vs.* LYDIA D. CHEVER.

If one in possession of land as a disseisor has died insolvent before his adverse possession had continued for twenty years, the purchaser of the land at a sale by his administrator for the payment of debts will be entitled to hold it against his devisee, who has entered under the devise and continued in possession until the expiration of twenty years from the original disseisin, although such license and sale were after the expiration of the twenty years.

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WRIT OF ENTRY to recover possession of a small lot of land with a dwelling-house thereon.

The following facts were agreed in the superior court: Willard Peele died in 1835, owning the premises, and the same were set off to his widow as her dower, which was the only title she had thereto. On the 1st of December 1837 she executed a deed of the premises to James W. Chever, the tenant's husband. Mrs. Peele died on the 4th of May 1838. Chever took possession of the estate immediately upon receiving his deed, and held the same as a disseisor from the death of Mrs. Peele until his own death, which occurred on the 2d of May 1857; and in his will he devised all his estate to his wife, who since his death has held the premises in the same manner that he held them. Chever died insolvent, and his administrator with the will annexed, under license of the probate court granted in July 1861, sold the premises to the demandant, who is one of the surviving children of Willard Peele.

Upon these facts judgment was rendered for the tenant, and the demandant appealed to this court.

G. Wheatland, for the demandant, cited Gen. Sts. *c.* 102, § 11; *Ward* v. *Fuller*, 15 Pick. 185.

J. C. Perkins, for the tenant. At Chever's death, he was not the true owner of the estate. He had only a possessory title. The tenant came into possession under a devise from him, which created a privity between them, and enabled her to tack her possession to his, and thus on the 4th of May 1858 to obtain a perfect title. See 2 Washburn on Real Prop. 487, 490, 492, 493, and cases cited. *Sawyer* v. *Kendall*, 10 Cush. 245. *Melvin* v. *Proprietors of Locks & Canals*, 5 Met. 32. A subsequent sale of his possessory title could not defeat her title thus obtained. A purchaser from an administrator of one who holds only by adverse possession can obtain no advantage of that adverse possession, in reference to the statute of limitations, because there must be a period between the death of the disseisor and the sale by his administrator during which a privity of possession will not exist. If neither heirs nor devisees enter, the possession will be vacant, or restored to the disseisee; if

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they do enter, they hold for themselves, and there is no privity between them and the subsequent purchaser. In the present case, the tenant perfected the title in herself as the last disseisor. *Stephens* v. *Leach*, 19 Penn. State R. 262. *Parker* v. *Southwick*, 6 Watts, 377. *Armstrong* v. *Risteau*, 5 Maryland, 275. 2 Smith's Lead. Cas. (5th Amer. ed.) 563. The privity of a devisee is the same as that of an heir; *Newcomb* v. *Stebbins*, 9 Met. 545; and by reason of it her possession, when tacked, makes her title perfect. *School District in Winthrop* v. *Benson*, 31 Maine, 381. *Cook* v. *Babcock*, 11 Cush. 206. *Stearns* v. *Hendersass*, 9 Cush. 497. *Piper* v. *Richardson*, 9 Met. 158. Whatever interest the devisor had came to her by the will. The administrator had no title; he had a mere power to sell. By omitting to exercise this power, he left her in a condition to perfect her title. See *Boynton* v. *Peterborough & Shirley Railroad*, 4 Cush. 467; *Smith* v. *Bryan*, 12 Ired. L. (N. C.) 11. It is easily demonstrated that the tenant has a better title than the demandant. The title of Peele's heirs was better than that of Chever, at the time of the latter's death. But the tenant has succeeded in supplanting these heirs, and holds a title not only superior to theirs, but their very title, or at least one which they cannot controvert. And the demandant has only the title which Chever had.

Chapman, J. The demandant claims title under James W. Chever, deceased, who entered upon the premises on the 1st of December 1837, under a deed of warranty from the widow of Willard Peele, and continued in undisturbed possession till his decease, which occurred on the 2d of May 1857. Chever's estate proved to be insolvent, and the land in question was sold by his administrator to the demandant, under a license of the probate court, for payment of his debts. He had devised the land to the tenant, who is his widow, and she entered under the devise and has continued in possession. Upon these facts the demandant is entitled to recover, inasmuch as the title of a devisee is divested by an executory sale, under the license of the probate court, for the payment of debts.

But the tenant's defence rests on other facts. She alleges that

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the title of her husband was defective, and that she has perfected it since his decease, and is therefore entitled to hold the land against the demandant. On this point it is agreed that Willard Peele owned the land at the time of his decease; that he died leaving children and grandchildren; that the land was set off to his widow as her dower, and that when she conveyed it to James W. Chever in 1837 she had no other title. She died in May 1838, so that twenty years had not quite elapsed from the time of her death to that of Chever's. Apparently, therefore, the heirs of Willard Peele might at any time during Chever's life, and for nearly a year after his death, have recovered the land by virtue of their better title. And when the time of limitation was completed, the tenant was in possession as devisee, and so she says the title by disseisin was perfected by her and is in her.

But the obvious answer to this defence is, that the title of James W. Chever was good against all the world except the heirs of Willard Peele and those claiming under them, and, as the tenant does not claim under them, that title is good against her. A tenant in a writ of entry cannot set up an outstanding title in strangers, with whom he has no privity, and under whom he does not claim, except for the mere purpose of rebutting the demandant's evidence of seisin. *Hunt* v. *Hunt*, 3 Met. 175. *Sparhawk* v. *Bullard*, 1 Met. 95. *Wolcot* v. *Knight*, 6 Mass. 418. But in this case James W. Chever was seised of the premises from the time of his purchase, and died seised; and the heirs of Willard Peele have never been seised. Neither they nor any one claiming under them have ever set up any title to the land. They have never authorized the tenant to set up their title, or to make any use of it; and the law gives her no such authority. This case must therefore be decided as if their title had never existed. Indeed the conclusive presumption of law now is, that James W. Chever had a valid conveyance of the land from the heirs of Peele, and that his seisin was under it. As soon as this presumption arose, it made the whole title valid If the tenant desired to avail herself of the title of Peele's heirs, so as to protect herself against her husband's creditors by

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means of it, she should have obtained a conveyance of it before the time of limitation expired, and then this presumption would never have arisen. But she is in possession in actual privity with the title of her husband, and with no other title; and the question between her and the demandant is merely which of them holds that title. *Judgment for the demandant.*

BENJAMIN F. HALLETT & others *vs.* WILLIAM W. FOWLER.

A plaintiff in replevin cannot maintain his action simply by showing that since it was commenced the defendant has gone into insolvency, although the assignee does not appear and take upon himself the defence.

REPLEVIN of a piano. At the trial in the superior court, before *Putnam*, J., it appeared that since the commencement of the action the defendant had gone into insolvency, and an assignee had been appointed, who did not appear and take upon himself the defence. The plaintiffs objected that the defendant had no right to appear and contest the action; but the judge ruled otherwise. The plaintiffs offered no evidence upon the merits of the case, and a verdict was accordingly returned for the defendant, and the plaintiffs alleged exceptions.

S. H. Phillips, for the plaintiffs.

S. B. Ives, Jr., for the defendant.

METCALF, J. The ground taken by the plaintiffs is, that although they show no title to the property which they took from the defendant on their replevin writ, yet that he cannot defend this action, because all his property has been assigned under the insolvent laws, since the action was commenced. They insist, in the brief of their counsel, that "the defendant lost all control of the defence of this case by his insolvency, and by force of the assignment." The effect of this position is, that a party whose property is assigned under the insolvent laws, after an action of replevin is brought against him, must

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necessarily have judgment against him in that action, although the plaintiff has no title to the replevied property.

To entitle the plaintiffs to maintain this action, they were bound to prove that the piano was their property, general or special, of which they had the right to immediate possession, and that it was unlawfully taken or detained from them by the defendant; and upon their proving all this, they would have been entitled to judgment against the defendant for damages and costs. *Johnson* v. *Neale*, 6 Allen, 228. Gen. Sts. *c.* 143, § 17. The fact that the title which the defendant once had to the piano had passed to his assignee in insolvency, did not oblige the assignee to come in and defend the action, nor entitle the plaintiffs, though the assignee did not come in, to recover without proving their case. The assignee having deliberately omitted to take any part in the suit, we need not inquire what would have been his rights and liabilities if he had undertaken the defence. We express no opinion on the question whether the insolvent laws authorized him to make a defence to this action in his own name. Assuming that they did, yet neither the assignment of the defendant's property to him, nor his omission to interpose, could oblige the defendant, without being heard, to suffer judgment against him for damages and costs in favor of those who prove no title, and from which a certificate of discharge in insolvency would not protect him.

Exceptions overruled.

ISRAEL CARLTON 2D *vs.* PHINEAS E. DAVIS.

If goods have been taken by replevin from an attaching officer, a judgment in favor of the plaintiff in the replevin suit is conclusive evidence of title in him, as against the attaching plaintiff, and also as against a person who, after the replevin, and having notice thereof, has caused a further attachment of the goods to be made, under Gen. Sts. *c.* 123, §§ 35–39; and it is immaterial that the second attaching plaintiff erroneously supposed that the first attaching plaintiff would defend the replevin suit.

If two separate owners mingle their goods together, it is the duty of an officer who wishes to make an attachment upon a writ against one of them to ascertain, if he can, what portion of the goods belongs to each; and not to attach the whole of them without making the inquiry.

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REPLEVIN of a stock of millinery goods.

At the trial in the superior court, before *Putnam*, J., the only question was as to the plaintiff's title. To prove his title he offered in evidence a bill of sale of the goods from Charlotte J. Carlton to Stephen C. Carlton, in December 1861; a bill of sale from said Stephen to Elizabeth Cheever, in January 1862; and a bill of sale from said Elizabeth to himself, in April 1862. It appeared that, in said January, after the bill of sale to said Elizabeth, David Boynton caused the goods to be attached upon a writ against said Charlotte, and upon the same day the goods were replevied by said Elizabeth. Subsequently to the replevin, Bryant Stephenson and others sued out a writ against said Charlotte, upon which a further attachment of the goods was made in the manner provided by Gen. Sts. *c.* 123, §§ 35–39, as shown by the officer's return upon the writ. The said Elizabeth recovered judgment in the replevin suit, upon a default. In July 1862 the said Stephenson and others sued out another writ against said Charlotte, upon which the goods in question were attached by the defendant, as deputy sheriff.

It also appeared that the last attachment embraced certain goods purchased and added to the stock since the sale to Elizabeth Cheever, and the defendant contended that these, though purchased in the names of said Elizabeth and of the plaintiff, really belonged to said Charlotte, and that all of the above conveyances were fraudulent, and that the goods mentioned in them belonged to said Charlotte.

The judge instructed the jury that they were to determine, upon the evidence, whether Stephenson and others, or their attorney, knew of the first attachment and of the replevin suit by Elizabeth Cheever; and whether, if they had such knowledge, they had reasonable cause to believe that the replevin suit was defended by Boynton; that the return of the officer upon their writ was conclusive evidence that they had such knowledge; that they, having such knowledge, were bound to defend the replevin suit, unless they had reasonable cause to believe that Boynton was defending it; that if they had not such cause, then the judgment in the replevin suit would be conclusive in

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this case against the defendant; and that otherwise the judgment would not be conclusive against the defendant, and they might consider all the evidence as to the various conveyances before as well as after the judgment, and determine whether they were made in fraud of Charlotte's creditors, and whether the goods subsequently purchased were in reality purchased for her, and, from the whole evidence, determine the title to the goods now in controversy.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

H. N. Merrill, for the plaintiff.

H. Carter, for the defendant.

Dewey, J. 1. The judgment in the replevin suit instituted by Elizabeth Cheever was a bar to all questions of title adverse to her that might have been set up by the original attaching creditor of Charlotte J. Carlton. It was equally so as respects the attaching creditors, Stephenson and others, who had attached the property under the provisions of Gen. Sts. *c.* 123, §§ 35–39, pending the replevin suit, and who thus made themselves common parties with the prior attaching creditor, in reference to the effect of a judgment in favor of Elizabeth Cheever.

The presiding judge properly ruled that the return of the officer serving the process for Stephenson & Co. was plenary evidence that they had notice of the replevin suit; but the qualification as to the effect of their having reasonable cause to believe that the creditor who made the first attachment was defending the replevin suit, and that the conclusiveness of the judgment in replevin as respects them would depend upon that fact, was erroneous. Stephenson and others, having made a second attachment of the same goods attached by Boynton, which were attached by both as goods of Charlotte J. Carlton, are to be conclusively affected by the judgment in the replevin suit of Elizabeth Cheever. The title of the plaintiff, through the bill of sale from Elizabeth Cheever of the stock of goods replevied by her, was a good title.

2. Upon the further question, as to the property in that portion

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of the goods purchased subsequently to the institution of the replevin suit, the right of the defendant to attach those articles as the property of Charlotte J. Carlton is an open question to the parties. The question of property in those goods is to be settled upon its own merits. The fact that goods have been subsequently purchased and added to the stock owned by Elizabeth Cheever does not defeat the right of the plaintiff to recover for the taking of the old stock. Although the defendant may show the newly purchased articles to be the property of Charlotte J. Carlton, and liable to be taken as such by her creditors, yet the officer had no right to attach the whole stock without first endeavoring to ascertain what particular portion of the stock was of that character. It was his duty to make the inquiry in the first instance, and not that of the other party. *Smith* v. *Sanborn*, 6 Gray, 134. But, as it seems, the purpose was to attach all of the stock, and the defendant now insists that it was all liable to attachment on the writ of Stephenson and others.

The verdict must be set aside, and the case tried under rulings on matters of law as above indicated. *Exceptions sustained.*

ABNER HOSMER *vs.* EDWIN SARGENT.

In the execution of a power of sale in a mortgage of personal property, the mortgagee has a right, in the exercise of a reasonable discretion, to adjourn the sale from time to time, without doing so through the agency of a licensed auctioneer or giving any new notice to the mortgagor.

TORT for the conversion of a horse, two wagons, a harness and a cow.

At the trial in the superior court, before *Brigham*, J., it appeared that on the 13th of July 1861 the plaintiff, being the owner of the property, executed a mortgage thereof to the defendant which contained a power of sale in the usual form, requiring seven days' notice of the time and place of sale to be

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given to the mortgagor, to secure the payment of a note for $179.83 within three months. On the 23d of October, the note remaining unpaid, the defendant served upon the plaintiff a notice of his intention to sell the property at auction on the 1st of November following, and sought to obtain possession thereof, but was only able to get one of the wagons. He accordingly on the 1st of November, without the intervention of an auctioneer, and without giving any new notice to the plaintiff, adjourned the sale until November 8th and made proclamation thereof, and on the 8th again adjourned in like manner to the 13th, and on that day again adjourned in like manner to the 15th, when the property was sold by an auctioneer for a sum less than the amount of the note. The judge ruled that, inasmuch as the defendant did not sell the property on the 13th, (it then being in his hands,) but adjourned the sale again to the 15th, the sale upon the latter day was not a lawful execution of the power contained in the mortgage, and was evidence of a conversion which would authorize the plaintiff to maintain his action. The jury returned a verdict for the plaintiff, and the case was reported for the determination of this court.

S. B. Ives, Jr., for the defendant, cited *Richards* v. *Holmes*, 18 How. (U. S.) 147; *Jackson* v. *Clark*, 7 Johns. 225; *Sayles* v. *Smith*, 12 Wend. 57; *Miller* v. *Hull*, 4 Denio, 104; *Warren* v. *Leland*, 9 Mass. 265; *Russell* v. *Richards*, 2 Fairf. 371; *Lantz* v. *Worthington*, 4 Barr, 153.

D. Saunders, Jr., for the plaintiff, cited, in addition to cases cited by the defendant, *Smith* v. *Provin*, 4 Allen, 516; Gen. Sts. *c.* 50, §§ 7–9.

CHAPMAN, J. The defendant had a mortgage of the property in question, with a power of sale; and, the debt being unpaid, he undertook to execute the power of sale. After appointing a a time and place of sale, and giving the plaintiff due notice thereof, he adjourned the sale from time to time, and at the time of the last adjournment he employed an auctioneer, by whom the sale was made. The plaintiff contends that these adjournments were unauthorized; and that, as no new notice of the sale was given to him, the sale was void.

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But this question was thoroughly discussed in the case of *Richards* v. *Holmes*, 18 How. (U. S.) 143. That was a bill in equity to set aside a sale under a deed of trust made to secure the payment of a note, the deed being in effect a mortgage with power of sale. Mr. Justice Curtis gives conclusive reasons why a trustee should have power to adjourn such a sale; and he remarks that such a sale, regularly adjourned, is, when made, in effect, the sale of which previous notice had been given. If the plaintiff neglected to attend at the time and place first appointed, he was not entitled to further notice. The right to adjourn must, of course, be subject to a reasonable limitation, and the trustee must act in good faith. But no question arises in this case on these points. The objection is simply that no right to adjourn existed.

The right of a sheriff or other public officer to adjourn a sale, as being incident to the power to sell at auction, is settled in Maine, New York, and in this commonwealth. And if a public officer not appointed by the party, and acting independently of him, has such power, there is no reason why a trustee appointed by the party and acting under his express authority should not have it also. In both cases the reasons for its exercise are the same. It enables the seller to prevent the property from being sacrificed, and at the same time to prevent the loss of the labor and expense already incurred in giving notice of the sale.

Another objection urged by the plaintiff is, that though an auctioneer was employed to make the sale, yet he was not employed to make the adjournments. The only reason why it was necessary to employ an auctioneer is, that other persons are prohibited from making sales at auction by Gen. Sts. *c.* 50, § 9. But the statute applies only to the act of sale, and, as it is a penal statute, it must be construed strictly. It does not, either in its terms or its spirit, prohibit other persons from appointing the time and place of a sale, advertising, giving notice to interested parties, and making adjournments. These acts are preliminary to a sale, but constitute no part of the contract or act of sale. This objection, therefore, cannot prevail. There being no other objections to the sale than those above stated, judgment must be for the defendant. *Verdict set aside*

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TIMOTHY P. MORRILL & others *vs.* SMITH TITCOMB & others.

Mere declarations of one in possession of land, in favor of his own title, are inadmissible.

WRIT OF ENTRY. Plea, *nul disseisin.*

At the trial in the superior court, before *Vose*, J., it appeared that in 1839 David Morrill, the father of the tenants, executed a deed of the premises to Timothy P. Morrill, the father of the demandants, and continued in the possession of the premises for more than twenty years thereafter; and the only question was, whether he gained a title by adverse possession after the execution of his deed. The demandants claimed title as the heirs of said Timothy, and the tenants as the heirs of said David. The tenants called a witness to whom, for the purpose of proving that said David held the premises adversely to said Timothy P., they put these questions: "Did you ever hear David Morrill make any statement as to who owned these premises? Did you ever hear David Morrill say that he claimed the premises?" It did not appear nor was it suggested that the declarations of David Morrill, sought to be proved, were made upon the premises; and the judge excluded the evidence.

The jury returned a verdict for the demandants, and the tenants alleged exceptions.

C. Lamson, for the tenants.

S. B. Ives, Jr., for the demandants.

BIGELOW, C. J. The evidence which was excluded was clearly incompetent. It did not come within the recognized exceptions to the general rule by which hearsay evidence of the declarations of deceased tenants or occupants of real estate is held to be admissible on the trial of an issue of title. The questions put to the witness were not for the purpose of showing that the tenants' ancestor, when on the land, made a declaration accompanied by any act, such as pointing out a monument or existing boundary. Nor did they tend to elicit statements by him in disparagement of his apparent title, as indicated by his possession. On the contrary, the declarations of the deceased

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occupant sought to be proved were in support of his own title, and in derogation of that of another person under whom the demandants now claim. We know of no principle on which such evidence can be deemed to be competent. *Bartlett* v. *Emerson*, 7 Gray, 174. *Currier* v. *Gale*, 14 Gray, 504. *Osgood* v. *Coates*, 1 Allen, 77. *Exceptions overruled.*

JOHN BRADY *vs.* JAMES BRADY.

If the price to be paid for the use of a horse and wagon is in controversy, one who has bought, sold and used similar ones may testify to his opinion of the value of such use.

In an action against the surviving partner of a firm, the plaintiff is a competent witness.

CONTRACT brought against the surviving partner of a firm of grocers in Lawrence, to recover, amongst other things, for the use of a horse, wagon and harness by his firm, for five hundred and twenty days.

At the trial in the superior court, before *Brigham*, J., the plaintiff called several witnesses who testified that they were grocers in Lawrence, and had bought and sold horses and wagons like those of the plaintiff, and had kept and used such property in their business for several years, and knew its value; but that they had never either hired or let to others such property, and did not know the price at which it was let. They were then asked, what was the value of the use of such a horse and wagon, in the business pursued by the defendant. The defendant objected that the witnesses had not qualified themselves to testify as experts; but the objection was overruled. The defendant also objected that the plaintiff was incompetent as a witness; but this objection was overruled, and he was permitted to testify, though not to declarations of the deceased partner.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

S. B. Ives, Jr., for the defendant.

D. Saunders, Jr., for the plaintiff.

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DEWEY, J. 1. The witnesses were competent to testify to the question propounded. They had previously stated that they had bought and sold horses and wagons like those owned by the plaintiff, and had kept and used such property in their business for some years.

2. The competency of the plaintiff to testify as a witness, notwithstanding the death of one of the copartners for whom the services were rendered, is not further questioned by the counsel for the defendant. By the construction we have given to the statute, the party to the original cause of action still survives, if one of the members of the firm is living.

Exceptions overruled.

ISAAC PATCH *vs.* GEORGE WHEATLAND & others.

One partner may execute a valid mortgage of a vessel owned by the firm, by signing the individual names of the members of the firm.

CONTRACT brought against the assignees of the estate of George F. Wonson, Samuel G. Wonson, Jr. and William S. Wonson, partners under the firm of George F. Wonson & Brothers, insolvent debtors, to recover the amount received by them upon the sale of vessels formerly owned by the firm. It was agreed, in the superior court, that George F. Wonson executed mortgages of the vessels in controversy to the plaintiff, signing them with his own name and the individual names of his partners, without their personal knowledge, but for the benefit of the firm. Upon these facts, judgment was rendered in the superior court for the plaintiff, and the defendants appealed to this court.

G. Wheatland, for the defendants, submitted the case without argument.

C. P. Thompson, for the plaintiff.

BIGELOW, C. J. The power of one copartner to make and execute a valid transfer, either absolute or conditional, of a ship, vessel or other personal property belonging to the firm, is clear

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and unquestionable, and has been often recognized and affirmed by this court. *Lamb* v. *Durant*, 12 Mass. 54. *Tapley* v. *Butterfield*, 1 Met. 515. *Milton* v. *Mosher*, 7 Met. 244.

That this power was well executed in the present case, we cannot doubt. One of the copartners, having authority to pass a valid title to the vessels by bill of sale, as incident thereto could execute them in any form or mode by which such title could be legally transferred. It is quite immaterial whether it was done by signing the name of the firm or the name of each copartner separately.

A very different question would arise if one copartner should undertake to sign the separate names of his copartners to any contract, promise or agreement, by which a separate or individual or a new and additional liability might be created or assumed. *Judgment for the plaintiff.*

ADOLPHUS DURANT *vs.* ESSEX COMPANY.

A final decree of the supreme court of the United States, dismissing a bill in equity after a hearing, is a bar to a subsequent suit in equity in this court for the same cause, between the same parties, although the record shows that such decree was passed by a divided court.

BILL IN EQUITY, to which the defendants filed a plea in bar setting forth that the plaintiff formerly commenced in the United States circuit court for the district of Massachusetts a bill in equity against the defendants for the same cause, which was dismissed, and on appeal to the supreme court of the United States the decree dismissing the same was affirmed, "by a divided court." The defendants also filed another plea in bar and an answer, and the case was reserved by *Dewey*, J. for the determination of the whole court, upon facts which are sufficiently stated in the opinion.

C. Cushing & N. W. Hazen, for the plaintiff. The appellate court ordered it to be made a part of the record of its decree, in the former case, that it was made by a divided court. By this

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order they designed that nothing done by them should affect either party in another proceeding. The plaintiff seeks relief against a fraud, the existence of which has been judicially established, but without producing any final judicial determination upon the merits. A decree was at one time made in his favor which he declined to accept, deeming it inadequate. The judge subsequently reversed his former decree, and ordered the bill to be dismissed. This decree was affirmed, on appeal, by a divided court. The court were divided, as the plaintiff has always been informed, on the measure of relief; but they were unanimous that the plaintiff was entitled to some relief. He now seeks his remedy in this court. For all the purposes of this case, the supreme court of the United States is a foreign court, nor is their decree binding upon this court, to prevent justice. See *Ostell* v. *Lepage*, 5 De G. & Sm. 95; *Cann* v. *Cann*, 1 P. W. 723. Even at common law, the principle of *res judicata* is only applicable to matters directly adjudicated. *Dutton* v. *Woodman*, 9 Cush. 261. *Burlen* v. *Shannon*, 14 Gray, 438. *Clapp* v. *Thomas*, 5 Allen, 158. *Clapp* v. *Thaxter*, 7 Gray, 384. *Sweet* v. *Tuttle*, 14 N. Y. 465. A practice still more lenient and liberal is found in equity. *McDowell* v. *Langdon*, 3 Gray, 513. It has not been intended that any jurisdiction of the court shall conclude any party in another litigation, upon a fact or point upon which the mind of the court has not been exercised. And no less result can follow when, by reason of a division among the judges, there has been no actual determination upon the merits. Accordingly at common law no judgment or decree could be rendered by a divided court. *Proctor's Case*, 12 Co. 117. *Thornby* v. *Fleetwood*, 1 Stra. 383, 384. *Boulton* v. *Bull*, 2 H. Bl. 500. *Peacock* v. *Bell*, 1 Saund. 69. *Goddard* v. *Coffin*, Daveis, 381. The entry of a decree like that in question in this case stands wholly upon the somewhat recent practice of the supreme court. *Somerville* v. *Hamilton*, 4 Wheat. 230. *The Antelope*, 10 Wheat. 66. *Etting* v. *Bank of United States*, 11 Wheat. 59. See also *Bridge* v. *Johnson*, 5 Wend. 342; *Reed* v. *Davis*, 4 Pick. 217; *Guild* v. *Guild*, 15 Pick. 129; Com. Dig. Court, D 5; 2 Tidd's Pract. 930. A judgment affirmed on an equal division leaves the

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question entirely open. *Morse* v. *Goold*, 1 Kernan, 281. It is not the exercise of a judicial jurisdiction, and should not be enforced in another suit. *Ewer* v. *Coffin*, 1 Cush. 28. 3 Bl. Com. 395. 2 Dan. Ch. Pr. 1192. 1 Greenl. Ev. § 530. *Van Dyck* v. *Van Beuren*, 2 Caines R. 103. No case has been found in which the decree of a divided court has been held to be a bar in another action. There are many cases which establish rules and principles leading to an opposite result. *Perine* v. *Dunn*, 4 Johns. Ch. 140. *Holmes* v. *Remsen*, 7 Johns. Ch. 286. *Walden* v. *Bodley*, 14 Pet. 156. *Foote* v. *Gibbs*, 1 Gray, 412. *Bigelow* v. *Winsor*, Ib. 299. A plea of a decree so obtained is of itself an attempt to take an unfair and unconscionable advantage. *Chesterfield* v. *Jansen*, 1 Atk. 301. *Bateman* v. *Willoe*, 1 Sch. & Lef. 205. *New England Bank* v. *Lewis*, 8 Pick. 113.

E. Merwin & J. J. Storrow, for the defendants, cited, in addition to some of the foregoing authorities, *Homer* v. *Fish*, 1 Pick. 440; *Shears* v. *Dusenbury*, 13 Gray, 292; *Jennison* v. *Springfield*, Ib. 544; *Stockton* v. *Ford*, 18 How. (U. S.) 420; *Washington Bridge Co.* v. *Stewart*, 3 How. (U. S.) 413; *Simpson* v. *Hart*, 1 Johns. Ch. 95; *Trask* v. *Hartford & New Haven Railroad*, 2 Allen, 331; *Bennett* v. *Hood*, 1 Allen, 47; *Merriam* v. *Whittemore*, 5 Gray, 316; *Sargent* v. *Fitzpatrick*, 4 Gray, 511; *Burke* v. *Miller*, Ib. 114; *Greene* v. *Greene*, 2 Gray, 364: *Foote* v. *Gibbs*, 1 Gray, 412; *Adams* v. *Pearson*, 7 Pick. 341; *Eaton* v. *Cooper*, 29 Verm. 444; *Wayman* v. *Southard*, 10 Wheat. 42.

Chapman, J. The land which is the subject of the present suit is admitted to be the same which was demanded in the case reported in 14 Gray, 447. In that action, which was a writ of entry, the defendants in this suit recovered the legal title, so that it must be assumed to be in them now. The ground of the decision was, that the defendants were entitled to the land by virtue of conveyances from the plaintiff. The opinion is also expressed that they are entitled to it by virtue of a deed from his assignee in insolvency, and that his equitable claims are barred by a decree in a suit in equity rendered against him in the United States court. But it is remarked that, if he has any equitable interests, they must be tried by a suit in equity, and

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cannot be regarded in an action at law. The present suit is brought to enforce his alleged equitable claims to the property. The bill alleges, in substance, that the land was owned and possessed by him, with a paper-mill and machinery thereon; that he was carrying on business in the mill; that he made a mortgage of the property to Jesse Sargeant; that Sargeant assigned his mortgage to Stephen Barker; that Barker agreed for a certain consideration to convey the property to the plaintiff; that he negotiated a sale to Larkin Thorndike, which was given up, and a contract was made between him and Daniel Saunders, Samuel Lawrence and John Nesmith, which is set forth, being in substance an agreement that he should make a conditional deed of the land to them, and that they should execute a certain bond to him. It is then alleged that he made the deed, but that they did not make the bond; that they acted in behalf of the Essex Company; that they afterwards decided not to take the land from him; that they took a deed from Barker, conveyed their title to two of their associates in the Essex Company, and refused to execute their agreement with the plaintiff; and that the company brought the action above referred to and obtained the legal title and possession of the land, and have sold portions of it, and are about to sell other portions. The bill prays that the deeds under which the defendants hold the land may be declared void, a reconveyance to the plaintiff decreed, and an injunction granted against further sales.

The defendants plead in bar that the plaintiff brought his bill in equity for the same cause of action in the circuit court of the United States for the district of Massachusetts, in which he sought the same relief in substance that he seeks in this bill; that answers were filed to said bill, to which answers the plaintiff filed a replication; that testimony was taken and a hearing was had; that certain relief was decreed to him, which he declined to accept; that a further hearing was had, upon which his bill was decreed to be dismissed; that he appealed to the supreme court of the United States; that his appeal was heard and argued at Washington, and thereupon it was decreed that the final decree of the circuit court, dismissing his bill, should

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stand affirmed, with costs for the defendants; that, upon the mandate of the supreme court being filed in the circuit court, the plaintiff moved that his bill might be dismissed without prejudice, but that the motion was denied, and it was decreed that execution should issue against him for costs.

The defendants further plead in bar their judgment in the writ of entry above mentioned. They also file an answer, denying the alleged fraud.

The plaintiff contends that neither the decree of the United States court nor the judgment in the writ of entry is a bar to this suit. He files a copy of the record of the decree entered in the supreme court of the United States, which is as follows:

"This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and was argued by counsel. On consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs. By a divided court."

The plaintiff's counsel properly admit in their argument that the suit above mentioned was for the same cause of action with the present suit, but contend that there was no decree entered in it which can be a bar to the present suit. The objection which they make to the decree is, that it purports to be made by a divided court.

In the English courts of common law, it was the early practice that, when the judges were equally divided in opinion upon an essential question of law, no judgment should be given. *Proctor's Case*, 12 Co. 117. But it has not been so in this commonwealth. If a cause is tried in this court before a single judge, and his ruling upon an essential point is excepted to, and the judges are equally divided in respect to it after argument, judgment is commonly rendered in conformity with his ruling. If he reserves questions of law for the consideration of the full court, and the judges are equally divided on a point which involves the plaintiff's right to recover, judgment is commonly rendered for the defendant. If a cause is brought up from a

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lower court on a question of law by exception or appeal, and the judges are equally divided, the judgment of the lower court is commonly affirmed. In such cases the decision of the court relates to the questions of law which are raised, and not to the rendition of a final judgment. There is an agreement that it is expedient to render the judgment and thus finish the litigation. It is expedient in respect to the interests of the public, and it is often highly so in respect to the interests of the parties. There is also a strong presumption that a point decided by a single judge has been decided rightly, and it is reasonable in such cases that this presumption should stand. In New York the practice is similar to ours. *Bridge* v. *Johnson*, 5 Wend. 342. *Morse* v. *Goold*, 1 Kernan, 281. It is similar in the United States court. *Etting* v. *Bank of United States*, 11 Wheat. 59. The judgment of that court in the present case is an authority to the same point. The record has all the elements of a final decree. It purports to order, adjudge and decree that the decree of the circuit court be affirmed with costs. In its substance it would not have been different if the judges had agreed in every point unanimously. We do not understand the statement that it was rendered by a divided court to mean that they were divided as to the question whether it should be rendered, but merely as to the questions of law which had been involved in it. The statement was not intended to invalidate it as a decree; but to affect its value as a precedent in other cases, and to furnish a reason for not publishing an opinion of the court. But it was designed to be binding on the parties, and it is so. One of its effects is, that it is a bar to another suit for the same cause. Such has always been the effect of a decree dismissing a bill in equity after hearing, when it is not expressed to be dismissed without prejudice. See *Foote* v. *Gibbs*, 1 Gray, 412. The present suit being barred by that decree, it is not necessary to notice the other points that have been presented.

Bill dismissed, with costs for defendants

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MIDDLESEX COUNTY.

Lowell Five Cents Savings Bank *vs.* Inhabitants of Winchester.

If the inhabitants of a town have authorized their treasurer to borrow a certain sum of money for a specific purpose, and to give his note as treasurer therefor, and he has exercised this authority, they are not liable upon a note given by him in their name for money subsequently borrowed by him and converted to his own use, although he assumed to be acting under the authority conferred upon him, and the lender supposed that he was doing so.

Contract upon two notes of $2000 each. The first note was as follows: "$2000. Lowell, January 22, 1858. For value received, the inhabitants of the town of Winchester promise the Lowell Five Cents Savings Bank to pay them or their order two thousand dollars on demand with interest semi-annually. Treasurer of said town, duly authorized by a vote of the town, N. A. Richardson." The second note was in the same form, and dated May 26, 1858. Upon each there were various indorsements of interest paid.

The following facts were agreed in this court, and found by *Hoar*, J.:

At a town meeting of the inhabitants of the town of Winchester, duly held March 23d 1857, N. A. Richardson was elected treasurer and collector, and was duly qualified and gave bond as required by law. At a meeting of said inhabitants duly held on the 1st of May 1857, the following vote was passed: "Voted, that the treasurer be authorized to borrow a sum of money, not exceeding two thousand dollars, to meet the demands upon the treasury in anticipation of the taxes, and give his note as treasurer therefor." Claiming to act by authority of the above vote, on the 13th day of May 1857 said Richardson borrowed one thousand dollars of Stephen Cutter, of Winchester, and on the 20th of June 1857 another thousand dollars of the same person, and gave his notes as treasurer therefor. These loans were negotiated and notes given with the knowledge of the defendants;

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they were paid at maturity, and were brought into Richardson's annual account with the town, and were applied to the use of the town; but these facts were unknown to the plaintiffs, and no steps were taken to learn the same.

On the 22d day of January 1858, without the knowledge of the defendants or any other officer of the town, Richardson, claiming to act under the aforesaid vote, made application to the plaintiffs at their banking house in Lowell to borrow for the use of the town of Winchester two thousand dollars, and did then borrow and receive of them two thousand dollars, and gave them the note declared on in the first count of the declaration, at the same time leaving with them a copy of the vote of the town, certified by the town clerk of Winchester, as follows: [after copying the above vote,] "I hereby certify that the above is a copy of a vote passed by the town at the town meeting held on the first day of May 1857. Josiah Hovey, Town Clerk." Upon this note interest was paid regularly by Richardson, but neither the note, the money borrowed thereon, nor the interest paid was brought into any of his accounts with the town, and the defendants had no knowledge thereof until March 1861, when, Richardson having become insolvent, payment was demanded by the plaintiffs of the defendants; but none of these facts, except payment of interest, were known to the plaintiffs, and no steps were taken to learn the same.

On the 22d day of March 1858, at a town meeting of the inhabitants of said Winchester duly held, the following vote was passed: "Voted, that the treasurer be authorized to borrow, under the direction of the selectmen, a sum of money, not exceeding two thousand dollars, ($2000,) to meet the demands on the treasury in anticipation of the taxes, and that he give his note as treasurer therefor." By authority of the above vote, on the 29th day of March 1858, Richardson, having been at the said March meeting again duly elected treasurer and collector, and having been duly qualified and given bond as required by law, borrowed from the Woburn Bank two thousand dollars, and gave a note as treasurer of said town therefor, payable in six months, at the same time leaving with said bank the following

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certificate, signed by the town clerk and the selectmen of Winchester respectively: [after copying the vote,] "Winchester, March 29th 1858. I hereby certify that N. A. Richardson was chosen treasurer and collector of this town at the annual meeting March 22d inst., and that the above vote was passed by the town at said meeting. Josiah Hovey, Town Clerk." "In accordance with the above vote, we, the selectmen of Winchester, authorize the treasurer to negotiate the above loan. Luther R. Symmes, Cephas Church, Sam'l M. Rice, Selectmen of Winchester." This note was paid at maturity, and was brought into the treasurer's annual account in March 1859, and the money so borrowed was applied to the use of the town; but none of the facts relating to this loan were known to the plaintiffs, and they took no steps to learn the same.

On the 26th day of May 1858, Richardson, claiming to act under said last mentioned vote, made application to the plaintiffs at their banking house in Lowell to borrow for the use of the town two thousand dollars, and did borrow and receive of them two thousand dollars, and gave the note declared on in the second count of the declaration, at the same time leaving with them the following certificate, signed by the town clerk: [after copying the vote,] "A true copy of the vote passed at the annual meeting of the town, March 22, last past. Winchester, May 19, 1858. Attest, Josiah Hovey, Town Clerk." On the back of this certificate there was the following indorsement: "Approved, L. R. Symmes, Cephas Church, Sam'l M. Rice, Selectmen of Winchester." The interest on this note was paid semi-annually by Richardson, but neither the note, the money borrowed, nor the interest paid was brought into any of his accounts with the town, and the defendants had no knowledge thereof until March 1861, when, Richardson having become insolvent, payment was demanded by the plaintiffs of the defendants; but none of these facts, except payment of interest, were known to the plaintiffs, and no steps were taken to learn the same.

At neither of the times when the notes declared on were given did the town need the money borrowed, nor was the same

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applied to their use, but these facts were not known to the plaintiffs, and at both times Richardson claimed to borrow the money for the use of the town, under the authority of and for the purposes set out in said votes, and at both times there were taxes due and unpaid to the town, but the amount thereof due on the 22d of January 1858 was very small. The plaintiffs did not know at the time when either of said loans were made, and the notes therefor were given to them, that Richardson had borrowed any sum under either of said votes, and they took no steps to ascertain the same.

On the 17th of April 1857, under a vote of the town passed March 23d 1857, authorizing the borrowing of $2000, Richardson, on behalf of the town, borrowed of the plaintiffs $2000, and gave them his note as treasurer therefor, which note was paid March 9th 1858, and, at the same time of borrowing said money, Richardson left with the plaintiffs a certified copy of the record of said town showing his election as treasurer and collector, and reciting the vote authorizing him to borrow the money.

The signatures of the selectmen upon the certificate appended to the second note were obtained by the treasurer for a dishonest purpose, and improperly, but in what way or upon what rep resentation or for what purpose, as understood by the selectmen, there was no evidence; and the fact that they were obtained improperly was not known to the plaintiffs, and they took no steps to ascertain it. It was not proved that the certificate appended to the first note declared on was ever given to Stephen Cutter.

Upon these facts, the case was reserved for the determination of the whole court.

J. G. Abbott & D. S. Richardson, for the plaintiffs. A town treasurer is the agent of the inhabitants of the town, placed by them in a position of trust and confidence which gives him credit. They may protect themselves against his dishonesty by a bond, and by checks and limitations in their votes; but the public have no means of protection, and may therefore rely upon his representations, while he is acting under apparent

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authority. He is the custodian of the money. It is peculiarly within his knowledge whether he has exhausted his authority; and it would be impossible to find out lenders and inquire of them, if he does not choose to make them known. If the plaintiffs cannot recover, all loans to towns must be at the peril of the lender, and he, though without fault or the means of protection, must suffer from the dishonesty of the agent, against which they can protect themselves and him. As between the two, the defendants should suffer rather than the lender, because they employed dishonest and careless agents, and put them in a position to commit a fraud upon the plaintiffs. *Hern* v. *Nichols*, 1 Salk. 289. *Lobdell* v. *Baker*, 1 Met. 203. *Locke* v. *Stearns*, Ib. 563. *Wade* v. *Withington*, 1 Allen, 563. *Clement* v. *Leverett*, 12 N. H. 317. *Glidden* v. *Unity*, 33 N. H. 577. *Farmers' & Mechanics' Bank* v. *Butchers' & Drovers' Bank*, 16 N. Y. 125. *North River Bank* v. *Aymar*, 3 Hill, (N. Y.) 262. *Gould* v. *Venice*, 29 Barb. 442. The defendants are estopped from denying the treasurer's authority, and from showing that he had already exhausted his authority, because in doing this they would show the fraud and dishonesty of their agent towards the plaintiffs. The loan by the plaintiffs was in all respects according to the authority given by the defendants to their agent; the notes were sufficient on their face to bind the defendants; the plaintiffs knew nothing tending to render any reasonable person suspicious; and they were guilty of no laches in not ascertaining the agent's frauds. Under these circumstances, the fact that the agent had previously exhausted his authority is no defence. When a loss arises simply from the dishonesty of the agent selected, while he is acting strictly within the terms of his authority, so far as third persons can discover, the principal who appointed the agent must be the sufferer.

T. H. Sweetser & C. P. Curtis, Jr., for the defendants, cited *Butterfield* v. *Melrose*, 6 Allen, 187; *Mussey* v. *Beecher*, 3 Cush. 511; *Goff* v. *Rehoboth*, 12 Met. 26; *Murdock* v. *Mills*, 11 Met. 5; *Upton* v. *Suffolk Mills*, 11 Cush. 586; *Wood* v. *Goodridge*, 6 Cush. 117; *Nash* v. *Drew*, 5 Cush. 422; *Keyes* v. *Westford*, 17 Pick. 273; *Millet* v. *Stoneham*, 26 Maine, 78; *Brady* v. *Todd*

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9 C. B. (N. S.) 591; *Hubbersty* v. *Ward*, 8 Exch. 330; *Grant* v. *Norway*, 10 C. B. 665; *Schooner Freeman* v. *Buckingham*, 18 How. (U. S.) 182, 191; *Alexander* v. *Mackenzie*, 6 C. B. 766.

BIGELOW, C. J. There is no view of the facts of this case, in which, according to the rules of law applicable to the relation of principal and agent, the defendants can be held liable on the notes declared on.

It is conceded that the treasurer of a town, *virtute officii*, has no authority to borrow money in the name or behalf of a town, or to pledge its credit in any way. It is also admitted that the defendants did not clothe their treasurer with any general authority or power to procure a loan of money for them or to give his note as treasurer, to be binding on them for an unlimited amount. On the contrary, it appears that the authority vested in him by the votes of the town previous to the negotiation of the loans with the plaintiffs was strictly limited, both as to the amount which he was empowered to borrow on the credit of the town, and the purpose for which the money was to be appropriated by him. There can be no doubt, therefore, that he was in the strictest sense a special agent, acting under a limited and clearly defined authority.

Nor can there be any doubt that the nature and extent of this authority were fully known to the plaintiffs at the time they advanced this money and received the notes which they seek to enforce in this action. Copies of the votes of the town, by which the treasurer was authorized to borrow specific sums in anticipation of the taxes, were given to the plaintiffs. The only other important fact in the case, of which however it appears that the plaintiffs were ignorant, is, that before the treasurer applied to them to obtain the loans which they made to him, he had acted under the power conferred on him by the votes of the town, had borrowed of others the amounts which he was authorized to get on credit, and had thus entirely exhausted the authority which the defendants had vested in him.

The unavoidable legal conclusion from these admitted facts is, that when the plaintiffs advanced money to the treasurer and took from him the notes declared on, he had ceased to be

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the agent of the town to borrow money, or to enter into any negotiations for a loan for which their credit was to stand pledged. He was then for such purposes a stranger to the defendants, and had no more power or authority to bind them, or to give notes in their name or behalf, than any other citizen of the town. If, therefore, they are to be held liable in this action, it cannot be on the ground that the plaintiffs dealt with their agent. The relation of principal and agent no longer subsisted between him and the town. His authority was then at an end, and the fact that he had been previously clothed with an agency to act in behalf of the town has no legal tendency to prove an authority to enter into the contracts, in their name and behalf, which are the subject of this action. This is not a case, therefore, where an agent, during the continuance of his authority, has exceeded its limits, by going beyond his instructions or doing some act outside of the scope of his agency. The facts show that the agency had terminated, and that the transactions on which it is now attempted to charge the defendants were entered into without any authority at all from them. It is clear, then, on these facts, that the defendants cannot be charged on the notes declared on, as contracts which were entered into by their agent.

On what principle, then, can the plaintiffs maintain this action? The answer which they make to this question is, that it was the act of the defendants in appointing the treasurer as their agent to borrow money for them, which enabled him to practise a fraud, by which the plaintiffs were induced to part with their money, and that the case therefore comes within the familiar principle that, whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. In other words, that it was the votes of the town authorizing the treasurer to borrow money which put it into his power to deceive the plaintiffs, and that they ought not to bear a loss occasioned by an act into which they were innocently led by the apparent authority with which the defendants had clothed the person who deceived them. But it seems to us that this position rests on

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a misapplication of a rule of law to a state of facts which does not bring the case at bar within the principle on which the rule is founded.

It is certainly true that principals have been held to be bound by acts and representations of their agents, which were never authorized. But it will be found that, in all such cases, the unauthorized act or representation was part of a transaction or dealing which was within the power given to the agent, and was done or made, not only during the continuance of the agency, but in the course of the employment delegated by the principal, although contrary to the private instructions or in excess of the authority actually granted. Thus, if a person authorized to sell an article makes false representations concerning its nature and quality, in violation of the orders of his principal, the latter will be bound, because he holds the agent out as competent to act for him in the particular transaction; and it is reasonable that of two innocent parties he who enables a third person to commit a fraud should bear the consequences of the unauthorized act. Such was the leading case of *Hern* v. *Nichols*, 1 Salk. 289. But it is to be observed that in this and similar cases the agent when he commits the fraud is, as to the main transaction, acting strictly within his authority, and that the unauthorized fraudulent act is only incidental to that which is within the power granted to him. Take another case, somewhat different in its character, to which the principle would be applicable: An agent is authorized to give the notes of his principal to obtain money for a specific and designated purpose. A third person lends money to such agent, and takes from him the promise of the principal. The latter would be liable on such promise, although the money was procured by the agent with an intention to misapply it by appropriating it to his own use, or to some other object different from that for which he was authorized to procure it. The lender in such case ought not to suffer a loss by reason of the fraudulent or unauthorized act of the agent, but its consequences should fall on the principal who had employed the agent, and put a false confidence in him, by which he was enabled to deceive others. The doctrine

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that a principal is responsible for the deceit or fraud or misrepresentations of his agent is to be taken with the limitation that such acts, though unauthorized, are committed during the existence of the agency, and while the agent is employed in doing the business committed to his hands. But the rule cannot be extended so as to render the principal liable for acts or statements made either in dealings which were never authorized by the principal, or in transactions which, although originally embraced within the power, in fact took place after the agency was wholly terminated. To hold otherwise would be equivalent to saying that a principal who appoints a special agent with a limited authority is responsible for his wrongful acts committed not only outside of the power intrusted to him, but also after his authority has entirely ceased. It is certainly reasonable that a principal should be held liable for the fraud, deceit or misrepresentations of his agent, although unauthorized, if practised in the course of his employment, or while dealing for and in behalf of his principal. Inasmuch as in such cases the principal transaction is within the power granted to the agent, so must all the incidents and means by which it was accomplished be deemed to be imputable to him. But to carry the doctrine farther would enable an agent not only to enlarge his authority so as to embrace matters which were never included within it, but also to continue it after it had ceased.

If these views are correct, the principle or rule of law on which the plaintiffs rely in support of this action is not applicable to this case. When the loans were negotiated and the notes were given which are set out in the declaration, the agency of the treasurer to borrow money for the town had terminated. The specific acts which he was alone authorized by the votes to do had been fully accomplished. He could then neither bind the town by any act nor by any representation. The case is much stronger against the right of the plaintiffs to charge the defendants for the unauthorized act of the agent than it would have been if it had appeared that the treasurer, when he dealt with the plaintiffs, was possessed of a limited authority, which he exceeded in his transactions with them

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But even in such case the authorities are quite decisive that the principal would not be bound by the act of the agent. In *Grant* v. *Norway*, 10 C. B. 665, the master of a vessel had signed a bill of lading for twelve bales of silk shipped on board the vessel, which was indorsed and pledged to the plaintiff for a valuable consideration. No such goods were in fact received by the master. It was held that the owners of the vessel were not liable to the plaintiff on this contract of the master; that although he was their general agent, with authority to sign bills of lading, it was an authority limited to the signing of such bills for goods actually shipped. A similar decision was made in *Coleman* v. *Riches*, 16 C. B. 104, on a somewhat different state of facts. The action was brought to recover of the defendant the value of certain grain. The facts of the case were these: The plaintiff was a dealer in grain. He was in the habit of paying the price to vendors of the article on the production of receipts, signed by the defendant's agent, that a certain quantity had been delivered at the defendant's wharf. The defendant's agent signed a false receipt for grain which had not been so delivered, and, on the presentation of the receipt, the plaintiff paid the price of the grain. In an action against the defendant to recover the price thus paid, it was held that the defendant was not liable, because his agent was authorized to sign receipts only for grain actually delivered, and not for that which was not received by him. See also *Hubbersty* v. *Ward*, 8 Exch. 330; *Mechanics' Bank* v. *New York & New Haven Railroad*, 3 Kernan, 599, 633; *Schooner Freeman* v. *Buckingham*, 18 How. (U. S.) 182. The case of *Mussey* v. *Beecher*, 3 Cush. 511, is a decisive authority in favor of the defendants. If it is distinguishable at all from the case at bar, it is for the reason that the facts there proved afforded less ground for exonerating the principal than those which are agreed in the present case. The defendant in that case authorized the agent to purchase goods on his account during a period of time not exceeding a year, with a proviso limiting the right to purchase and incur debts to an amount not exceeding at any one time the sum of two thousand dollars. During the year the plaintiff sold goods

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to the agent, and it was held that he could not recover the price thereof from the principal, if, at the time of the sale, the agent had exceeded the prescribed limits, although the plaintiff was able to show that the agent, at the time of the purchase, represented that he would not thereby exceed his limit, and, in reply to inquiries by the plaintiff, stated that the limit allowed to him had not been exceeded. Two facts existed in that case which are wanting here. One is, that the agent actually made false representations as to the extent of his agency at the time of the transaction in question. None are stated to have been made in the present case, except such as might have been implied from the presentation to the plaintiffs of the votes of the town, and the negotiation of the loans. The other fact, still more important, which existed in *Mussey* v. *Beecher* is, that the purchases were made during the year that the agency was to continue. In the case at bar, the loans were made after the agency had terminated. If the decision of the majority of the court in *Mussey* v. *Beecher* was correct, as we think it was, it is clear that the defendants cannot be held liable in this action.

It is suggested that it was impossible for the plaintiffs to ascertain whether the agent had exhausted his authority by borrowing the money which he was empowered to obtain in behalf of the town, prior to his application to the plaintiffs, and that as they dealt with him on the faith of the apparent authority vested in him by the votes of the town, and in ignorance of a fact the truth of which they had no means of finding out, the defendants ought to be held liable. We do not see that the conclusion legitimately follows from the premises. A similar argument was urged without success in *Mussey* v. *Beecher*. It seems to us that there are two decisive answers to it. The first is, that it does not appear in the present case that the plaintiffs could not have ascertained by a reasonably diligent inquiry that the treasurer, before his application to them, had fully executed his power and exhausted his authority. On the contrary, it appears that, when the first loan was negotiated by the agent with the plaintiffs, it was well known to the defendants that long previously he had borrowed of another person in behalf of the

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town the full sum he was authorized to obtain. By inquiry of the principal, the plaintiffs could have ascertained this fact. Besides; the money was borrowed by the agent under circumstances well calculated to excite suspicion and put the plaintiffs on their guard. This is especially true in regard to the first loan. The negotiations of the plaintiffs in relation to it took place several months after the vote of the town authorizing the treasurer to obtain money for the temporary purpose of anticipating the revenue of the town from the taxes of the current year, and when on its face the transaction was one which, to say the least, was open to question as being in excess of the agent's authority. The second loan was made under different circumstances, but it was negotiated by the same person to whom they had made the previous advance of money, and while that loan still remained unpaid, a circumstance of itself sufficient to cause the plaintiffs to doubt the honesty and good faith of the agent with whom they were dealing. But, apart from all this, there is a more comprehensive answer to the argument urged by the plaintiffs. It is this: The principal is not to be held bound by an act of the agent which exceeds the authority vested in him; if the authority is conditional or dependent on the existence of some fact, whoever deals with the agent must see to it that the condition is fulfilled, or that the requisite fact exists on which the authority to bind the constituent depends. If, for example, a person empowers an agent to act for him while absent in a foreign country, and expressly provides that the authority is to cease on his return home, can it be doubted that in such case it is the duty of the person who undertakes to deal with the agent to ascertain whether the authority has terminated by the return of the principal, and that the latter would not be bound by anything done by the agent after the authority had ceased by the prescribed limitation? The liability of the principal certainly cannot be made to turn on the ease or difficulty with which the continuance or termination of the authority can be ascertained. Such a doctrine would create a new head in the law of agency. The true rule is the safe one for both parties. The principal cannot be held responsible

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for an act of his agent beyond the limits of the authority delegated to him, unless it is done in the course of the agent's employment in the business of his principal, and during the continuance of the agency. If this is not the rule, a principal is at the mercy of his agent, and may be held bound for acts which he never authorized, however carefully he may have limited and guarded the power which he intrusted to him. On the other hand, whoever deals with an agent must at his peril ascertain whether the agent has any authority in fact, and, if he has whether the act or dealing is within its scope. If this can be ascertained, there will be no risk incurred; if it cannot be ascertained, the sure protection will be to refrain from dealing with the agent at all. *Judgment for the defendants.*

THE PRESIDENT, DIRECTORS AND COMPANY OF THE WALTHAM BANK *vs.* SARAH WRIGHT.

It is culpable neglect, within the meaning of *St.* 1861, *c.* 174, § 2, not to bring a suit against an administrator within the time limited by law, if the party having the claim has knowledge of the existence of the debt, of the statute limitation, and of the time when it will expire, and no fraud or imposition has been practised upon him, and the delay is not caused by accident or mistake.

HOAR, J. This suit in equity is brought under the provisions of *St.* 1861, *c.* 174, § 2, which is as follows: "Whenever any one has a claim against the estate of a deceased person, which has not been prosecuted within the time limited by law, he may apply to the supreme judicial court by bill in equity setting forth all the facts; and if the court shall be of opinion that justice and equity require it, and that said claimant is not chargeable with culpable neglect, in not bringing his suit within the time limited by law, they may give him judgment for the amount of his claim against the estate of the deceased person; but such judgment shall not affect any payments or distributions made before the commencement of such bill in equity."

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The defendant contends, among other grounds of defence, that the plaintiffs are chargeable with culpable neglect, in not bringing their suit within the time limited by law.

It is not easy to give a precise definition of the phrase "culpable neglect," as used in the statute; or to lay down a fixed rule of interpretation which may serve as a test of all cases arising under it. "Culpable" means not only "criminal" but "censurable;" and when the term is applied to the omission by a person to preserve the means of enforcing his own rights, "censurable" is more nearly an equivalent. As he has merely lost a right of action which he might voluntarily relinquish, and has wronged nobody but himself, "culpable neglect" would seem to convey the idea of neglect for which he was "to blame;" that is, the neglect which exists where the loss can fairly be ascribed to his own carelessness, improvidence or folly.

The statute limiting suits against executors and administrators is an important one, and it cannot be supposed that the legislature have intended to render it practically nugatory. Within a few years the period of limitation has been shortened from four years to two. Administrators are bound to plead the special statute of limitations to suits against them, and no promise of the administrator can waive or avoid the statute, so as to bind the estate. *Brown* v. *Anderson*, 13 Mass. 201. *Thompson* v. *Brown*, 16 Mass. 178. *Emerson* v. *Thompson*, Ib. 429. We think, therefore, that the statute of 1861 was not intended to furnish a remedy for a case where a creditor, knowing that his debt is due, and knowing the statute of limitations applicable to it, and that his debtor is deceased and administration taken on his estate, and no fraud or imposition being practised upon him, without accident or mistake, voluntarily permits the time limited by the statute to expire, without enforcing his claim by a suit, and that such a case presents an instance of "culpable neglect." And we do not think this conclusion is altered by the fact that the creditor has relied upon an oral promise that the debt should be paid out of a particular fund, and expected that it would be so paid. Such a promise is

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binding neither upon the administrator nor upon the estate. It would clearly be negligence in an agent to trust to it, and allow the limitation to attach. It is "neglect," a disregard of his known rights, in the principal, for which, if he loses by it, he has himself only "to blame."

We understand the case at bar to come precisely within this rule. The directors of the bank had full notice of the death of their debtor, and of the time when administration was taken on his estate. They voluntarily allowed the time limited by the statute to expire, trusting to their mortgage security, or to a promise by the agent of the administratrix that their debt should be paid from the proceeds of the ship Pam Flush. They did not attempt to enforce their rights seasonably, and fail by any accident or mistake. No fraud was practised upon them, and they trusted to a promise for the future which has now as much validity as it ever had, and does not constitute in law or equity, though unperformed, a fraud which entitles them to relief. The plaintiffs therefore fail to establish a case under the statute.

Bill dismissed, with costs.

E. Mellen & J. Rutter, for the plaintiffs.

J. G. Abbott & S. J. Thomas, for the defendant.

MOSES L. BUCK *vs.* SILAS MERRICK.

If a promissory note is made payable to the treasurer of a parish or his successor, without naming him, a declaration upon the note which alleges that at the time when it was given the plaintiff was the treasurer of the parish, and that it was payable to himself, is not demurrable, although an indorsement upon the note, which is copied as a part of the declaration, appears to have been made by a successor to the plaintiff in the office.

CONTRACT upon a promissory note dated October 24, 1849, signed by the defendant and a surety, payable to "the treasurer of the First Parish in Hopkinton, or his successor in said office." Copies of various indorsements of interest were appended to the copy of the note, the last of which, in 1861, was signed by "Edward E. Whittemore, treasurer." The declaration alleged

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that on the 24th of October 1849 the plaintiff was the treasurer of the parish, &c.; that the defendant made the note "payable to the plaintiff therein described as such treasurer, or his successor in office, and now owes the plaintiff the amount thereof with interest." The defendant filed a demurrer, assigning the following causes: 1. That it did not appear that the plaintiff had a right to bring the action; 2. That it did not appear that the plaintiff was treasurer at the time the action was brought; 3. That it did appear by the indorsement that the plaintiff had a successor in the office. The demurrer was overruled in the superior court, and judgment rendered for the plaintiff. The defendant appealed to this court.

No counsel appeared for the defendant.

J. Q. A. Griffin, for the plaintiff.

METCALF, J. As the note in suit is made payable to the treasurer of the First Parish in Hopkinton, or his successor in that office, and the declaration avers that the plaintiff was such treasurer when the note was made, and that it was payable to himself, his right to bring this action sufficiently appears. Whether, on a trial of the case, the evidence would show that the action is or is not rightly brought by him, is a question not open on the demurrer.

If there is any legal reason why the plaintiff cannot maintain this action in his own name, such reason should have been set forth in an answer, or be proved on a trial. No such reason appears on the face of the declaration.

One cause assigned for the demurrer is, that it appears, by an indorsement on the note, that the plaintiff had a successor in the office of treasurer. That indorsement is of interest received in 1861, signed by another man as treasurer. But the indorsements on the note are not declared on. And if payment of the whole amount of the note and interest were indorsed thereon, it would be no ground of demurrer to the declaration on the note. The plaintiff would have a right to prove any or all of the indorsements to have been made by mistake, by fraud, or without authority. *Demurrer overruled.*

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William O. Strong *vs.* Ira Moe.

A guardian who has sold real estate of his ward under a license granted on the ground that it would be for the benefit of the ward that it should be sold and the proceeds put out at interest or invested in some productive stock, has no right to apply such proceeds towards the support of the ward, unless a necessity therefor, arising after the granting of the license, is clearly established.

Appeal by the administrator of the estate of William W Moe from a decree of the judge of probate, allowing in part the account of Ira Moe as guardian of said William W. Moe, who was his son. In the account, as presented, the guardian charged himself with the proceeds of real estate sold, $513.07, and other items sufficient to make up the whole amount received by him to $862.97; and he asked to be allowed for the support of the ward the sum, including interest, of $1351.97, and other items sufficient to make up the whole amount for which he asked allowance to $1462.02. The judge of probate decreed that the sum of $599.05 be deducted from the sum for which the guardian asked to be allowed, thus leaving the account of receipts and disbursements, as allowed, to stand even.

It was agreed in this court that the guardian was appointed in June 1849, and that the ward was then seised of an interest in the real estate which was afterwards sold; that in April 1850 the guardian prayed for and obtained leave to sell the real estate on the ground that it would be for the benefit of the ward that it should be sold and the proceeds put out at interest or invested in some productive stock; that he accordingly sold the same, and in June 1850 received therefor the sum of $513.07; that he also received as the proceeds of personal estate the sum of $126.17; that, at the time of his appointment as guardian, the ward was nearly fifteen years old, and was interested in a small amount of other real estate besides that referred to above; that the ward has since died in New York, and the appellant is the administrator of his estate in this commonwealth; that the guardian has never settled any account with his ward or paid over or delivered the estate and effects remaining in his hands to the person lawfully entitled thereto, except so far as the same

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may be considered to have been done by the account rendered as above; and that he did nothing further in the probate court till 1861, after he had been cited to render his account, and a suit had been commenced upon his bond.

A deposition of the guardian was offered, and excluded as incompetent; it being agreed that, if competent, it might be taken as a part of the evidence in the case. Its contents, however, became immaterial by the decision. It also appeared that the guardian was in embarrassed circumstances and in debt, and had no means of supporting his family but by his labor from day to day.

Upon these facts the case was reserved by *Hoar*, J. for the determination of the whole court.

B. W. Whitney, for the appellant.

E. Pearson, for the appellee.

Dewey, J. The course of proceeding on the part of the guardian does not justify the application of the avails of the real estate of his ward, sold by virtue of the license obtained under the provisions of the Rev. Sts. *c.* 72, § 2, towards his support and maintenance, unless it be made clearly to appear that, subsequently to the granting of the license to sell and invest the proceeds, the same became necessary for his support, and that the ward was unable to support himself in a suitable and proper manner without expending such proceeds. If the situation of the ward and the want of pecuniary ability on the part of the father to furnish him with adequate support had required the real estate of the ward to be sold for that purpose, ample provision was made for such a case by the Rev. Sts. *c.* 72, § 1. The fact that the application was made for leave to sell the estate of the ward for the purpose of investing the proceeds negatives the idea that there was then any present necessity for using the avails for his support. The age of the ward and his apparent ability to earn his own support corroborate this view. In the opinion of the court, upon the evidence in the present case, no reason is shown for applying the proceeds of the sale of the land of the ward in discharge of any claim of his father for his board, clothing, custody and care; and the sum realized

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from the sale is not to be diminished by the allowance of such claims. But from the want of pecuniary ability of the father, an allowance to a reasonable and proper extent for support and maintenance, having regard to the amount of personal property of the ward and his income from real estate, and also the interest or income arising from the sum held for investment, may properly be made in favor of the guardian, though not beyond the amount received from those sources.

We have not found it necessary to consider the question raised as to the competency of the guardian as a witness in this case, the ward having deceased, inasmuch as the facts are not changed by the proposed testimony.

The decree of the judge of probate is reversed, so far as he has allowed the guardian for support, &c. any sums beyond the amount of the personal property of the ward and the income of the avails of the real estate sold, and other real estate which he may have owned. The sum of $513.07, which was realized from the sale of land, is not to be extinguished by any charges of the guardian, but a further deduction to that extent is to be made from the amount allowed to the guardian, and he is to be charged as now holding that sum, which is to be accounted for with the administrator of his ward.

Daniel Barry *vs.* City of Lowell.

No action lies against a city for a failure to keep a public sewer and cesspool in repair, whereby waste water accumulates and flows into the cellar of a neighboring house, which is not connected by a drain with the public sewer.

Tort to recover for damages sustained from a flow of water into the cellar of the plaintiff's house.

At the trial in this court, before *Metcalf*, J., it appeared that a public sewer had been built through the street upon which the plaintiff's house was situated, which was not laid deep enough

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to drain the plaintiff's cellar, and no drain led from the cellar to the sewer. There was a cesspool opposite to the plaintiff's house, which was frequently obstructed by dirt and gravel, and in winter by snow and ice, which prevented the water from passing freely through the same; and the water, in such cases, flowed over into the plaintiff's cellar, though if the sewer and cesspool were free from obstruction the water would all pass through them. The plaintiff complained to the authorities of the city, and several times removed the obstructions himself. A verdict was taken for the plaintiff by consent, and the case reported for the determination of the whole court.

T. Wentworth, for the plaintiff.

A. R. Brown, for the defendants.

Merrick, J. The damage for which the plaintiff seeks in this action to recover compensation was caused by the overflow on to his land and into the cellar of his dwelling-house, in consequence of the inattention and negligence of the defendants in keeping open and in proper repair one of their main drains and common sewers, of the surface water collected on one of the highways in the city. It is a general rule that no action lies at common law against a town for an injury sustained through any defect in a highway. *Mower* v. *Leicester*, 9 Mass. 247. *Sawyer* v. *Northfield*, 7 Cush. 494. And no remedy is given by any statute for such an injury as is described in the declaration. But the plaintiff relies upon the decision in the case of *Child* v. *Boston*, 4 Allen, 41, in which it was held that the defendants, upon the facts disclosed in that case, were liable to the plaintiff for the damage occasioned by surplus water forced back upon the plaintiff's land by suffering their common sewer to be stopped up and obstructed, so that no water could pass through or be discharged from the same. The reason why they were held liable in that case is, that the city ordinance requires all the particular drains from private estates to be entered into the main and common drains of the city, and to be laid and constructed under the direction of the board of aldermen. The owner of a private estate has therefore in such case no means of protecting it against the accumulation of water by the fall

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of rain or the melting of snow, if the city suffers its common sewer to be out of repair, or negligently stopped up and obstructed. As the city assumes to regulate the whole subject, and compels all individuals to conform to and comply with their ordinances, it results by necessary implication that they make themselves liable for whatever mischief or injury necessarily results from any negligence or omission of duty on their part.

But in the present case the defendants never by any act or ordinance required the plaintiff to draw the water from his land, or to make his private or particular drain open into their common sewer, but left him to manage his estate as he should think most for his own interest or advantage. He never connected or sought to connect any drain from his land with the common sewer of the city; and in fact he could not effectually have done so without alteration of the estate, for it appears that his cellar was below the lowest part of the common sewer.

Since the plaintiff was not required to conform his drainage to that which the city had provided for public purposes, and had in fact never made use in that way of the common sewer which they had constructed, he had a right to prevent the overflow of water from it on to his own land by erecting such obstructions there as were necessary for that purpose. But if he omitted to do so, and sustained damage in consequence of the failure of the defendants to keep their own works in good order or in due repair, he can maintain no action therefor, because none is provided for by statute, and because by the use of lawful means he might himself have prevented the injury. This principle was fully determined in the case of *Flagg* v. *Worcester*, 13 Gray, 601. In that case it appeared that the defendants knowingly and intentionally diverted the water from the highway in such manner that it necessarily fell and was discharged on to the plaintiff's land; yet it was held that an action to recover the damages occasioned by it could not be maintained. It is obvious that the neglecting to adopt suitable means to prevent the occurrence of particular injurious acts cannot be more culpable than the intentional doing of the acts themselves; and that if the latter would not afford a legal cause of action, none can be

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maintained for any of the consequences resulting from such alleged negligence.

The verdict, which was for the plaintiff, is to be set aside, and judgment is now to be entered for the defendants.

SABRINA NUDD *vs.* NATHAN S. HAMBLIN.

The omission to disclose a trespass upon real estate to the owner, if there is no fiduciary relation between the parties and the owner has the means of discovering the facts and nothing has been done to prevent him from discovering them, is not such a fraudulent concealment of the cause of action as will prevent the operation of the statute of limitations, under Gen. Sts. *c.* 155, § 12.

TORT for breaking and entering the plaintiff's close in Groton, and cutting and carrying away wood and timber therefrom. The defendant amongst other things relied upon the statute of limitations. At the trial in the superior court, before *Rockwell*, J., a verdict was returned for the plaintiff, upon facts and under instructions which sufficiently appear in the opinion. The defendant alleged exceptions.

D. S. Richardson & S. A. Brown, for the defendant, cited *Rouse* v. *Southard*, 39 Maine, 404; *McKown* v. *Whitmore*, 31 Maine, 448; *Cole* v. *McGlathry*, 9 Greenl. 131; *Farnam* v. *Brooks*, 9 Pick. 246; *Rice* v. *Burt*, 4 Cush. 208; *Hall* v. *Perkins*, 3 Wend. 631; *Irvine* v. *Kirkpatrick*, 3 Eng. Law & Eq. R. 34.

H. F. French & J. Q. A. Griffin, for the plaintiff, cited *Welles* v. *Fish*, 3 Pick. 74; *Homer* v. *Fish*, 1 Pick. 435; *First Mass. Turnpike Corp.* v. *Field*, 3 Mass. 201; *Way* v. *Cutting*, 20 N. H. 187.

CHAPMAN, J. The writ is dated June 17, 1862, and the trespasses which it alleges were committed in 1849 and 1850. The defendant relies on the statute of limitations, (Gen. Sts. *c.* 155,) and, in avoidance of this defence, the plaintiff relies on the 12th section of the statute, which provides that "if a person liable

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to any of the actions mentioned in this chapter fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within six years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards." This section is a reënactment of Rev. Sts. *c.* 120, § 12. Long before we had such a provision in our statute of limitations, it was held that a fraudulent concealment of the cause of action would prevent the operation of the statute until the plaintiff had obtained knowledge of its existence. *First Mass. Turnpike Corp.* v. *Field*, 3 Mass. 201. In that case the defendants had contracted to construct a turnpike for the plaintiffs. They did some of the work deceitfully, and covered the defective work with earth. They then represented that they had completed their work, and thereupon they received their pay for it. The defect was discovered after the lapse of six years, and it was held that on account of the fraudulent concealment of the defect by the defendants, the statute of limitations did not bar the action brought by the corporation to recover damages for the defective work. This doctrine was again held in *Homer* v. *Fish*, 1 Pick. 435, and *Welles* v. *Fish*, 3 Pick. 74. In *Farnam* v. *Brooks*, 9 Pick. 244, it was held to be applicable to a suit in equity.

The question in the present case is, whether the facts stated amount to a fraudulent concealment, and in the case of *Farnam* v. *Brooks* the question of what constitutes a fraudulent concealment is discussed. It is there held that it is necessary to prove a concealment, and a discovery of the fraud within six years; but that there is no concealment if the party possesses the full means of acquiring knowledge of the facts, and that the fraud must be actual and not merely constructive. The court cite the case of *Cole* v. *McGlathry*, 9 Greenl. 131. In that case the defendant had received of the plaintiff funds to pay certain debts, and falsely affirmed that he had paid them. It was held that though he was guilty of a breach of moral and legal duty, having added falsehood to his neglect to pay, yet it was not such a fraudulent concealment as would take the case out of the statute, because

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the plaintiff had the means of discovering the truth at all times, by inquiry of the persons who should have received the money This doctrine has again been held in Maine, in *McKown* v. *Whitmore*, 31 Maine, 448. This was an action to recover money which the defendant had agreed to deposit in a certain bank for the plaintiff, and which he told the plaintiff that he had deposited. It was held that, even if this statement was untrue, it did not constitute a fraudulent concealment, because the plaintiff had at all times the means of discovering the truth. In *Rouse* v. *Southard*, 39 Maine, 404, which was an action against a part owner of a vessel for repairs, the statute of limitations was pleaded, and to avoid its operation the plaintiff offered evidence that the defendant had denied that he was a part owner. But, as the ownership of the vessel was a fact which could have been ascertained without inquiry of the defendant, it was held that his denial was not a fraudulent concealment of the fact.

In *Way* v. *Cutting*, 20 N. H. 187, a doctrine was held which must be regarded as limiting the doctrine of the cases cited above, if it be not inconsistent with that doctrine. It was held that in a case where the plaintiff had a right to rely upon the representations of the defendant, the fraudulent misrepresentation of the defendant amounted to a concealment, although the plaintiff had the means of testing the truth and detecting the fraud. But there is nothing in the facts stated in the present case which makes it necessary to discuss such a limitation of the doctrine, because here was no concealment by false representations, and there was no fiduciary relation between the parties.

The general ground of policy upon which all statutes of limitation stand is stated in the old maxim, *Vigilantibus non dormientibus jura subveniunt.* Broom's Max. (3d ed.) 694. While on the one hand it is important that the law should protect every citizen against fraud and wrong, on the other hand it is equally important that those who seek the aid of judicial tribunals should not sleep over their rights, but ascertain and prosecute them with vigilance. The statute of limitations therefore shuts the doors of the courts against a party unless he brings

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his suit within the prescribed time, although his claim is still due, and good faith would require its payment. And when he would take advantage of the exception which gives him a further time in case the cause of action has been fraudulently concealed from him, yet, if he had the means of discovering the fact, his want of knowledge is to be attributed to his own want of vigilance, and not to concealment by others.

In *Farnam* v. *Brooks*, *ubi supra*, the court say that full means of detecting the fraudulent concealment are the same as knowledge.

Applying these principles to the evidence stated in the report, we find nothing to take the case out of the operation of the statute. The plaintiff was one of the heirs of Winslow Parker and the *locus in quo* was part of a tract of woodland, the whole of which contained thirty-nine acres and a half. The commissioners appointed by the probate court to make partition of the estate of Winslow Parker among his heirs set off to the plaintiff in the year 1825 about seventeen acres of the northeasterly part of this tract, and a part of the remainder to her sister Nabby Parker, who afterwards married David Hale. The partition was by metes and bounds. In November 1848 the defendant and one Nutting purchased of Hale and wife the wood and timber standing on their lot, and took a lease till April 1851, to enable them to cut and remove the same. While getting it, during the years 1849 and 1850, they cut off the wood and timber from nearly seven acres of the plaintiff's adjoining land. The evidence tends to show that Hale sold it to them, but that they were informed that he had sold a part of the plaintiff's wood, and had some reason to believe that this was the fact, and that they were trespassers. But assuming that they were wilful trespassers, a mere wilful trespass not committed by stealth is not legally a fraud, however wrong and unjust it may be. While the defendant was cutting the wood, one Reed expressed to him the opinion that he was cutting upon the plaintiff's land; but the defendant made no request that the fact should be concealed, and did no act to prevent the plaintiff from obtaining knowledge of it. The plaintiff was at that time

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under coverture, being the wife of Thomas Nudd, who was acquainted with the lot and its boundaries. They lived about three miles from it, and a private road led to it. The record of the partition was in existence, and the defendant, having some suspicion that he had trespassed upon the plaintiff's land, obtained a copy in 1851, from which he ascertained that his suspicions were well founded. Nudd died in February 1853, leaving the property again in charge of the plaintiff. The court are of opinion, upon all the evidence reported, and in view of the authorities cited, that the plaintiff as well as her husband had the means of ascertaining the cause of action by the exercise of ordinary vigilance, and that, as the defendant took no pains to conceal his acts, either while he was committing the trespasses or at any time afterwards, his mere neglect to go to the plaintiff and give her information of what he had done is not such concealment on his part as the statute contemplates.

Exceptions sustained.

AMOS CUTTER *vs.* EDWARD A. GAY.

A messenger in insolvency has no right to take into his possession personal property of the debtor which is under a valid attachment.

REPLEVIN of a horse and other property. It was agreed in the superior court that while the plaintiff, as constable, had possession of the property under a valid attachment upon a writ against the owner, Paine G. Ballou, the latter went into insolvency, and the defendant, as messenger, seized the same with other property of the debtor, and refused to deliver the same to the plaintiff on demand, but subsequently delivered the same to the assignee of the estate. On these facts judgment was rendered for the plaintiff, for one dollar damages, and the defendant appealed to this court.

T. H. Sweetser, (*W. S. Gardner* with him,) for the defendant,

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cited Gen. Sts. c. 118, §§ 18–21, 38, 44–46; *Judd* v. *Ives*, 4 Met. 401.

J. T. Joslin, for the plaintiff.

Bigelow, C. J. On the facts agreed, the plaintiff, at the time the goods in controversy were replevied, had a special property in them, and a right to their immediate and exclusive possession. He can therefore well maintain this action. *Gordon* v. *Jenney*, 16 Mass. 465, 469. The defendant, by virtue of his warrant as messenger in insolvency under the proceedings commenced by the general owner of the goods, acquired no right to take possession of property belonging to him which was then under a valid attachment on mesne process, and in the custody of an officer. It is the assignment, and not the warrant issued to the messenger, which operates to dissolve an attachment. *Edwards* v. *Sumner*, 4 Cush. 395. If for any reason the proceedings are stayed, or are held to be defective or insufficient, before the assignment is made, an attachment of the debtor's property is not dissolved, or the lien thereby acquired defeated or suspended. This is manifest from the provisions contained in Gen. Sts. c. 118, §§ 44, 45, by which it is enacted that the assignment shall vest in the assignee the property of the debtor which at the time of the commencement of the insolvent proceedings is under attachment, and that a dissolution of the attachment by force of the assignment may be prevented, if it shall be found necessary to continue it in force in order to vest a title to the property in the assignee. Until the assignment, therefore, the attaching officer holds the property in his custody, subject to such legal disposition of it as may be required, in case the proceedings in insolvency result in an assignment; or, if for any cause no assignment is made, then subject to the attachment on which it was originally taken by him. In either case, it remains in the custody of the law, and the rights of all parties are sufficiently protected.

Inasmuch as the property replevied in this case has been delivered to the assignee, and the plaintiff has no further claim to hold it under the attachment, the proper judgment is for the plaintiff for nominal damages, and for his costs

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Patrick Shea & wife *vs.* City of Lowell.

If, in an action to recover for damages sustained by falling upon the ice on a sidewalk, it becomes a question whether the defendants had taken reasonable pains to remove the ice, the plaintiff may show that in other places on the same sidewalk, similarly situated, the ice had been removed with a shovel only.

Tort to recover for a personal injury sustained by the female plaintiff, by falling upon the ice on the sidewalk upon the south side of Merrimack Street, in Lowell.

At the trial in the superior court, before *Rockwell*, J., it appeared that the course of Merrimack Street is nearly east and west, and that the houses upon it prevent the sun from shining upon its southerly sidewalk in winter. To prove that the ice at the place where the injury was received might have been removed with ordinary care and diligence on the part of the defendants, the plaintiffs offered evidence in relation to the state of the sidewalk for a distance of about forty rods, and were allowed to prove, under objection, that the ice at the time of the injury had been entirely cleared from the sidewalk in front of some of the buildings of equal height and similarly situated with that in front of which the accident occurred, and that a few days previous to the injury ice was removed in front of one of said buildings with a shovel only.

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

A. R. Brown, for the defendants.

T. Wentworth, for the plaintiffs.

Metcalf, J. The court are of opinion that the testimony to which the defendants objected was rightly admitted. The plaintiffs' declaration alleged that the defendants negligently suffered the southerly sidewalk in Merrimack Street to be unsafe, out of repair and covered with ice, whereby the female plaintiff, who was travelling on said sidewalk and using due care, fell and broke her wrist and arm. The answer of the defendants denied that the sidewalk was suffered to be out of repair, and alleged that, before the accident to the female plaintiff occurred, especial

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pains and care were taken by the defendants to make the sidewalk safe and convenient for travellers, but that it was beyond the power of the defendants to remove the ice therefrom; and that they took extraordinary care to protect the public from the ice.

At the trial the plaintiffs introduced testimony that, in the vicinity of the place in Merrimack Street where the female plaintiff fell and was injured, the ice had been removed from the sidewalk with a shovel only; and the manifest purpose of this testimony was to show that the ice where she fell might have been removed if reasonable means had been used by the defendants. We cannot perceive why this testimony was not competent. If the ice was, for any assignable reason, less easily removable from the place where the accident happened than from other parts of the sidewalk in the vicinity, the defendants had an opportunity to show such reason and submit it to the consideration of the jury. *Exceptions overruled.*

AUGUSTUS WILSON & wife *vs.* CITY OF CHARLESTOWN.

A person who voluntarily attempts to pass over a sidewalk which he knows to be very dangerous, by reason of ice upon it, when he might easily avoid it, cannot maintain an action against the town which is bound to keep the way in repair, to recover for injuries sustained by falling upon the ice.

TORT to recover for a personal injury sustained by the female plaintiff, in consequence of a defective highway. At the trial in the superior court, upon an agreement of the parties as to the facts established by the evidence, which are sufficiently stated in the opinion, *Lord*, J., ruled that the plaintiffs were not entitled to recover; and a verdict was returned for the defendants. The plaintiffs alleged exceptions.

J. F. Pickering, for the plaintiffs.

J. Q. A. Griffin, (*C. Robinson, Jr.* with him,) for the defendants.

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CHAPMAN, J. It is well settled that the burden was on the plaintiffs to prove that Mrs. Wilson used ordinary care. The report of the case states that the sidewalk was covered with ice so as to be very slippery and dangerous; that she had passed over it just before in company with a friend, and they both remarked upon its dangerous condition. It thus appears that it was dangerous, and that she knew it to be so. In returning from the house to which she went, it is stated that she attempted to pass to Union Street over the slippery sidewalk, and when she had proceeded about half way to Union Street, she slipped and fell, receiving the injury for which the action is brought. But in all this there is nothing that affirms or indicates the exercise of care. There was no evidence to submit to the jury on that point. The fact that the street in front of the sidewalk, and the sidewalk on the opposite side of the street, were in such condition that they could have been used safely and conveniently, which was shown, tended to prove a want of care on the part of the female plaintiff. It is settled that if a person knows a way to be dangerous when he enters upon it, he cannot, in the exercise of ordinary prudence, proceed and take his chance, and, if he shall actually sustain damage, look to the town for indemnity. *Horton* v. *Ipswich*, 12 Cush. 488. The case therefore presents not only an entire absence of evidence tending to prove care, but strong evidence of carelessness. The defendants were legally entitled to the verdict which was taken in their favor. *Todd* v. *Old Colony & Fall River Railroad*, 3 Allen, 21. *Denny* v. *Williams*, 5 Allen, 1. *Exceptions overruled.*

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Tudor Ice Company *vs.* Thomas Cunningham.

A grant of a right of way, with horses, carts and other vehicles, "to a street forty feet wide, and in, over and through said forty feet street," which street is owned by the grantor, and has been laid out by him between his lots, and is so situated that there will be much passing over the same, gives a right of way in the entire space of that width; and the grantee may maintain an action for damages, if the grantor or those claiming under him afterwards obstruct his convenient use and enjoyment of any part thereof.

Tort for the obstruction of a way.

At the trial in the superior court, before *Ames*, J., it appeared that on the 31st of May 1843 the Charlestown Wharf Company conveyed to Henry Jaques, his heirs and assigns, a wharf in Charlestown, and also "a right of way with horses, carts, carriages and other vehicles over and across the said land of the Charlestown Branch Railroad Company to a street forty feet wide, leading into Water Street, between lots numbered one hundred and twenty-three and one hundred and twenty-four on the plan hereinafter mentioned, and in, over and through said forty feet street to Water Street." The plan referred to showed that a long strip of land between Water Street and various wharves, including that conveyed by the deed, had been laid out into lots, and that the forty feet street referred to was laid out between two of the lots, and was opposite to one side of the wharf which was conveyed. The title of Jaques afterwards became vested in the plaintiffs, and the title to the soil and freehold under the way passed to the defendant, who was a manufacturer of boilers and steam engines, and occupied lot one hundred and twenty-four for that purpose. There was evidence that the defendant has often used the forty feet street by placing tanks and furnaces and other things there and doing work there, so that sometimes there was only room for one team to pass by, and that the plaintiffs had been much obstructed thereby. The defendant contended that the plaintiffs were not entitled to recover, even if this was true; but the judge ruled that the deed amounted to a stipulation that the entire space between the two lots should be set apart and used for a street,

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and not as a place of deposit for bulky articles, or for doing work; and that if the defendant, by making such use of the space, had obstructed it to such an extent as to amount to a practical inconvenience to the plaintiffs, the action might be maintained.

Upon this ruling it was agreed that a verdict should be taken for the plaintiffs, with nominal damages, and the case reported for the determination of this court.

T. H. Sweetser, for the defendant, cited *Appleton* v. *Fullerton*, 1 Gray, 186; *Johnson* v. *Kinnicutt*, 2 Cush. 153; *Underwood* v. *Carney*, 1 Cush. 292; *Atkins* v. *Bordman*, 2 Met. 468; *Harding* v. *Wilson*, 2 B. & C. 96.

C. Robinson, Jr., for the plaintiffs, cited *Farnsworth* v. *Taylor*, 9 Gray, 162; *Thomas* v. *Poole*, 7 Gray, 83; *Hastings* v. *Livermore*, Ib. 194; *Underwood* v. *Carney*, 1 Cush. 292; *O'Linda* v. *Lothrop*, 21 Pick. 292; *Salisbury* v. *Andrews*, 19 Pick. 258; *Parker* v. *Smith*, 17 Mass. 413.

Bigelow, C. J. This case is free from all doubt. The plaintiffs have by express grant a right of way over the entire premises on which the alleged obstructions were placed by the defendant. The nature and extent of this right are fully described in the deed under which the plaintiffs claim. It is "in, over and through a forty feet street;" that is, a right in the entire space of that width, for all the ordinary and usual purposes and uses of a street, and free from all hindrances, incumbrances and impediments, except those which are commonly or necessarily incident to its enjoyment by others having a right to a similar easement in the same strip of land. The grant of such a right is to be construed with reference to the place in which it is created, and the circumstances under which the grant was made. Here a right of way is granted over a street of specified width, in a populous neighborhood, in close proximity to wharves, where essels load and discharge, and where there is a necessity for the passing and repassing of teams engaged in the transportation of heavy merchandise. The parties to the grant must be presumed to have known and contemplated the necessities and usages incident to a grant of a right of way in such a locality.

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Underwood v. *Carney*, 1 Cush. 292. It is to be observed also that it is not a grant of a mere right of way over a piece of land, but a right of way in a street; that is, in a strip of land already dedicated to the purposes of a street, in a busy and much frequented neighborhood. In this respect the case is wholly unlike *Johnson* v. *Kinnicutt*, 2 Cush. 153, which was only a grant of a right of way over a strip of land, not used or described as a street, and where the description of the land was evidently not intended as defining the extent of the way granted, but only the place where a reasonable right of way was to be enjoyed.

On the evidence stated in the report, we think it clear that the defendant was guilty of placing obstructions and incumbrances on the place in controversy inconsistent with its convenient use and enjoyment by the plaintiffs as a street, and that the instructions given to the jury were well adapted to the facts in proof. *Judgment on the verdict.*

ASA GRAVES *vs.* CHARLES JACOBS.

If, in an action to recover the value of the labor of the plaintiff's intestate for several years before his death, the defendant has introduced evidence to show that by reason of confirmed intemperance and a chronic bodily disease his labor was not worth more than his board and clothing, and such small sums of money as were furnished to him for holidays, evidence is inadmissible in reply to show the amount and value of his labor the year before he commenced working for the defendant, and that there was no visible change for the worse in his health and habits thereafter.

MERRICK, J. This is an action of contract to recover $750 alleged to have been due to the plaintiff's intestate, Walter G. Graves, at the time of his decease, for labor performed by him during six years next preceding March 1st 1859 for the defendant upon his farm in Groton.

It is stated in the bill of exceptions that at the trial the plaintiff produced and read in evidence the report of an auditor, to

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whom the cause had at a former term been committed, from which it appeared that there was due to him, as administrator of the estate of said Walter, the sum of $352.50; and there he rested his case. The defendant then introduced much evidence tending to show that the said Walter did but little labor upon the farm, and was employed only on the lighter and easier portions of the work; that from habits of confirmed intemperance and also from chronic bodily disease and weakness his labor was not worth more than the expense of his maintenance; and that there was a special contract between the parties, by the terms of which the said Walter was to do only the least laborious part of the work, and was to be compensated for his services by being supplied with a home, his board and clothing, and small sums of money for holidays. He also produced other evidence; but as no question arises concerning it, there is no occasion now to recite or refer to it.

The plaintiff then called Asher Jewett, and proposed to ask him whether said Walter performed for him labor of the same general character in the year 1852 and earlier; and to show how he worked, and the value of his labor before he began to work on the defendant's farm; proposing also to show that there had been no visible change for the worse in his health and habits. The court ruled that the proposed evidence was inadmissible, and the testimony of the witness was excluded. To this ruling the plaintiff excepted.

In support of his exceptions he insists that this evidence was competent and should have been admitted to rebut that which, as above stated, had been produced on the part of the defendant and submitted to the jury. But it does not appear from anything set forth or reported in the bill of exceptions that the testimony of Jewett, if it had been admitted, would have been in conflict with any part of the evidence which the defendant had introduced. He had endeavored to show that the habitual intemperance of the said Walter, and the chronic disease to which he was subject, had essentially impaired his capacity to render valuable services as a laborer upon a farm. This seems not to have been in any degree contested or denied by the

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plaintiff. Giving to his offer of evidence the utmost force and effect which can be attributed to it, he only proposed to show that while said Walter worked in and previous to the year 1852 fo Mr. Jewett, his services were such as to entitle him to some compensation beyond his mere support and maintenance. But this is by no means inconsistent with the fact attempted to be proved by the plaintiff, that although the health of the said Walter did not afterwards decline or become visibly more impaired, the work which he actually performed during the six years subsequently to the time when he was in the employment of Jewett was not, considered altogether, reasonably worth more than his board and clothing and the small sums of money occasionally given to him on holidays. This being the question involved in the issue, it is manifest that no aid in its determination can be afforded by inquiries in relation to the value of services rendered at an earlier period and for a different person. They are independent transactions, in respect to which the rights of the parties are to be considered in view of the evidence applicable to each of them. Proof in reference to the one has no tendency to show what justice requires in the other case.

As the bill of exceptions does not show that the testimony of Jewett was erroneously excluded, the objection taken thereto by the plaintiff cannot be sustained. *Parmenter* v. *Coburn*, 6 Gray, 509. The other objections taken at the trial were not relied upon or brought to the attention of the court upon the argument upon the bill of exceptions, and are, therefore, considered as having been intentionally waived.

Exceptions overruled.

T. H. Sweetser & J. Q. A. Griffin, for the plaintiff.

G. A. Somerby & J. K. Bennett, for the defendant.

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ALFRED HACKETT *vs.* ALONZO P. B. KING.

If it is in controversy whether a release of personal property has been obtained through duress, by means of an arrest under a complaint and warrant upon a criminal charge, the declarations of the person arrested, prior to the making of the complaint, are competent evidence against him, for the purpose of showing probable cause for the charge.

Exceptions will not be sustained which simply show that incompetent declarations were admitted in evidence, without showing what the declarations were.

Evidence is admissible to show that a person has for several years been living at a rate of expenditure far beyond his apparent means, as tending to confirm other evidence of dishonesty in appropriating the property of his employer.

TORT for the conversion of a promissory note, horse and other property, of the value of $500. The defendant claimed title to the property under a release or bill of sale from the plaintiff; to which the plaintiff replied that the release was obtained from him through duress and fraud, by means of arrests under three complaints and warrants charging him with larceny of money of the defendant, who was his employer.

At the second trial in the superior court, before *Rockwell*, J., after the decision reported in 6 Allen, 58, the defendant was called as a witness in his own behalf, and was allowed to testify, under objection, to conversations between himself and the plaintiff, prior to the making of the complaints, as to acts done tending to show probable cause for making the complaints. The defendant's counsel then asked him what he stated to the city marshal, at the time of making the complaints against the plaintiff. This question was objected to, but the judge allowed the statements of the defendant in reference to the suspected larceny, made in the absence of the plaintiff, to be given in evidence as tending to prove probable cause. The defendant was then allowed, against the plaintiff's objection, to prove the plaintiff's habits of living and expenditures for four years while he was in the defendant's employment, as tending to prove that he would not be likely to have had so much as $500, if he had obtained it honestly. Other questions also arose in the case, which became immaterial.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

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R. B. Caverly & A. R. Brown, for the plaintiff.

D. S. Richardson & G. F. Richardson, for the defendant.

By the Court. Most of the questions raised by this bill of exceptions were decided when the case was before us at an earlier stage. *Hackett* v. *King*, 6 Allen, 58. The only points now argued, which are not disposed of by the decision then made, or which are not rendered immaterial by the verdict, are these.

1. The defendant was permitted, against the plaintiff's objection, to state conversations which he had with the plaintiff, prior to the complaints, relating to acts done tending to show probable cause for the complaints. The nature of the proof is clearly unobjectionable, being the plaintiff's own statement of the facts; and the fact of probable cause for the complaints has an important bearing upon one of the principal issues made to the jury, namely, whether the prosecution was instituted in good faith, or as a means of compelling the payment of the defendant's demand.

2. The defendant was also permitted to state what he told the city marshal when he complained to him against Hackett. This was certainly not competent evidence of the truth of anything which the statement contained. Whether it would not be admissible as showing that the marshal had good cause to obtain the warrants, and that the defendant made a fair and full statement of the facts as they were known to him, would certainly deserve consideration. But the exceptions do not show what the statements were which the defendant gave in evidence, nor that they were such as, whether admissible or not, would affect the case in any manner unfavorably to the plaintiff. There is therefore no sufficient ground for disturbing the verdict upon this point. *Burghardt* v. *Van Deusen*, 4 Allen, 374.

3. The admission of evidence that the plaintiff was living at a rate of expenditure far beyond his apparent means, as tending to confirm evidence of dishonesty in appropriating the property of his employer, is sanctioned by the case of *Boston & Worcester Railroad* v. *Dana*, 1 Gray, 83.

Exceptions overruled.

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REUBEN BACON *vs.* JAMES ROGERS & others.

An objection to the form of a certificate upon a deposition is not waived by the presence of the adverse party at the time the deposition was taken, without then making the objection.

TORT for seizing and carrying away the plaintiff's seines and fishing tackle.

At the trial in the superior court, before *Morton*, J., the plaintiff was allowed, under objection, to introdnce in evidence the deposition of Charles C. Pierce, taken before a magistrate in this commonwealth, in the presence of one of the defendants, the magistrate's certificate upon which set forth that the deponent was "cautioned and sworn to speak the truth, the whole truth and nothing but the truth;" and also the deposition of William Cheney, a soldier in the army, taken in Maryland before the colonel of a regiment, the certificate upon which did not set forth in detail a compliance with all the directions of the statute.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

E. C. Baker, for the defendants.

G. D. Noyes, for the plaintiff.

BY THE COURT. The deposition of Pierce being taken within this state, and the oath required by the statute "to testify the truth, the whole truth and nothing but the truth, relating to the cause for which the deposition is taken," not being shown to have been administered to the deponent, was not admissible in evidence. Gen. Sts. *c.* 131, § 23. *Simpson* v. *Carleton*, 1 Allen, 116. We do not think this objection was waived by the presence of one of the defendants, who made no objection to the deposition at the time on that ground. The witness testified to the circumstances of the seizure of the plaintiff's seines by the defendants; and, the action being an action of tort, these circumstances were material for the consideration of the jury on the question of damages. The exception to the admission of this deposition must therefore be sustained.

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The objection to the deposition of Cheney seems to be disposed of by the case of *Stiles* v. *Allen*, 5 Allen, 320.

Exceptions sustained.

HUBBARD P. ROSS *vs.* JAMES GERRISH.

In an action against an attorney at law to recover money collected in a suit in favor of the plaintiff, an answer which admits the collection of the money but avers that the plaintiff was only a nominal party to the suit, although it admits a *prima facie* case for the plaintiff, still leaves upon him the burden of proof to establish upon all the evidence his right to recover.

CONTRACT against an attorney at law, to recover money collected in a suit in favor of the plaintiff. The answer admitted the collection of the money, but averred that the plaintiff was only a nominal party to the suit in which it was recovered, and that the suit was in fact prosecuted for the benefit of Alfred Pollard, to whom the note which was the subject of the suit belonged. At the trial in the superior court, *Morton*, J. instructed the jury that the plaintiff must satisfy them by a preponderance of evidence that the defendant received the money for him, and that, although the answer admitted a *prima facie* case for the plaintiff, it did not change the burden of proof. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

G. M. Brooks, for the plaintiff.

T. H. Sweetser, (*W. S. Gardner* with him,) for the defendant.

METCALF, J. The defendant's admission, in his answer, that he received the money sued for, did not relieve the plaintiff from the burden of proving that the money belonged to him. The issue was on the question whether the money belonged to the plaintiff or to Alfred Pollard. The defendant's answer doubtless admitted a *prima facie* case for the plaintiff, but did not shift the burden of proof which was previously on him. The instruction given to the jury was therefore correct. *Powers* v.

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Russell, 13 Pick. 76. *Morrison* v. *Clark*, 7 Cush. 214, 215 *Central Bridge Corp.* v. *Butler*, 2 Gray, 131, 132.

Exceptions overruled.

MUTUAL SAFETY FIRE INSURANCE COMPANY *vs.* ARNOLD W. WOODWARD & another.

If a judgment debtor who has been arrested on an execution in favor of the "Mutual Safety Fire Insurance Company" is brought before a magistrate and desires to have a time fixed for his examination, and enters into a recognizance to the creditors which is erroneously entered of record as running to the "Mutual Life and Fire Insurance Co.," and the magistrate afterwards issues a notice of the time and place fixed for the examination to the creditors, under the same mistaken name, and the notice is sent in a letter to the creditors' attorney, who acknowledges the receipt of it as a notice to the creditors, they cannot object, in an action upon the recognizance, that the notice was insufficient by reason of the mistake, or that it was not duly served.

CONTRACT upon a recognizance, taken under Gen. Sts. *c.* 124, § 17, originally running to the Mutual Life and Fire Insurance Company, with condition that the defendant Woodward, who had been arrested on an execution in their favor, and desired to take the oath for the relief of poor debtors, should appear at a time and place named, which had been appointed for his examination, and submit himself to such examination.

At the trial in the superior court, without a jury, it appeared that Woodward was arrested on an execution in favor of the plaintiffs, and taken before a magistrate, who took the above recognizance, and afterwards issued a notice describing the plaintiffs by the same mistaken name, in which a time and place were named at which Woodward desired to take the oath for the relief of poor debtors, and delivered it for service to an officer who sent it in a letter to the person who then acted as the creditors' attorney, who acknowledged the receipt of it in a letter to the officer as follows: "Circumstances are such that it is doubtful whether I shall be present at the hearing of A. W. Woodward, arrested on execution in favor of the Mutual Safety

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Fire Insurance Company. And even if I should be present, it would probably make but little difference in the result, as I doubt not the examination will be conducted in a fair and impartial manner." After examination the oath was administered to Woodward; and, after the commencement of this action, the plaintiffs' said attorney informed the magistrate of the error in the recognizance, and requested him to correct his record, which was accordingly done.

Upon these facts, judgment was rendered for the defendants, and the plaintiffs appealed to this court.

S. G. Nash, for the plaintiffs.

T. Wentworth, for the defendants.

Dewey, J. Waiving the consideration of the question whether, upon the facts stated as to the actual appearance of the party before a magistrate and the taking of the oath, there would be any breach of the recognizance, and whether, in the absence of any special requirement to that effect in the recognizance, it was incumbent upon the debtor to give notice to the creditor, in order to comply with its stipulation, it seems to the court that enough was done to perform that duty, and to estop the creditor from avoiding the discharge for want of proper notice of the time and place of appearing before the magistrate. It is true that the notice was directed to the "Mutual Life and Fire Insurance Company," whereas the true name of the creditors was the "Mutual Safety Fire Insurance Company." But this corresponded with the form of the recognizance actually taken by the magistrate, which is made the subject of the present action. The same error was made by the magistrate in drafting the notice as in the recognizance. It is only by an amended statement of the recognizance, made after the action was instituted, that the recognizance is made to differ from the notice, in the name of the creditors. The notice in this form was sent in a letter to the attorney of the creditor by the arresting officer in due season, and the receipt acknowledged by a letter from the attorney of the creditors, and the terms of the letter thus sent to the officer show notice duly received of the proposed examination of the debtor.

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Under the circumstances of this case, the plaintiffs cannot object properly to the form of the notice, and the mode of the service was assented to by the attorney by his letter to the officer whose duty it was to serve the same.

Judgment for the defendants.

BRADFORD RUSSELL *vs.* DANIEL GOODRICH & another

After a magistrate has announced his decision not to administer the poor debtors' oath to one who has been arrested on execution and examined before him, he has no power to adjourn the case, and the debtor has no right of appeal, and is not bound by his recognizance to appear on any future day to which the case is adjourned.

CONTRACT on a recognizance taken under Gen. Sts. *c.* 124, § 10, with condition that the defendant Goodrich, who had been arrested on an execution in favor of the plaintiff, should within thirty days from the time of his arrest deliver himself up for examination, giving notice as therein provided, and making no default, and abide the final order of the magistrate thereon.

It was agreed in the superior court that after the parties had examined Goodrich, at the time and place fixed for the examination, the magistrate decided not to admit him to take the oath, and Goodrich appealed; and, at his request, he was not remanded to the custody of the officer, but was allowed two days to procure sureties, and the meeting was accordingly adjourned, and he went away and never afterwards appeared before the magistrate.

Upon these facts, judgment was rendered for the defendants, and the plaintiff appealed to this court.

A. F. Badger, for the plaintiff.

E. A. Kelly, for the defendants.

BIGELOW, C. J. We do not see that there has been any breach of the recognizance declared on. The debtor attended at the time and place appointed for his examination, and until it was finished, and the magistrate had made his final order and

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adjudication, by which he refused to administer to him the poor debtors' oath. He was then liable to be taken on the execution, if the officer was present to serve it. But the debtor was not bound to go in search of the officer, or to take any steps to cause himself to be arrested and committed to jail; nor has he committed any breach of the condition of his recognizance, because the officer failed to be ready to take him on the execution after the magistrate had refused him the oath. His presence there after the examination was completed and the decision of the magistrate was pronounced was a full compliance with the condition of the recognizance. *Jacot* v. *Wyatt*, 10 Gray, 236, 239. *Doane* v. *Bartlett*, 4 Allen, 75. *Skinner* v. *Frost*, 6 Allen, 285. All the subsequent proceedings of the magistrate, after he had adjudicated on the question of the right of the debtor to take the poor debtors' oath, were *coram non judice* and void. The law gives no appeal to the debtor from the decision of the magistrate, except in cases where charges of fraud have been filed under Gen. Sts. *c.* 124, § 5, and a hearing is had thereon, according to §§ 32, 33. No such charges were filed in the present case. The magistrate had no authority or jurisdiction to adjourn the case after he had decided to refuse the oath to the debtor, nor was the latter bound to attend at the time and place of such adjournment. *Judgment for the defendants.*

BENJAMIN WELCH *vs.* HIRAM S. BEERS & another.

If the owner of land which is subject to a mortgage conveys a portion thereof the value of which is more than sufficient to pay the mortgage debt, with a provision in the deed that the purchaser shall assume and pay the whole of the same, and afterwards conveys the residue of the lot with the understanding that the mortgage is to be paid by the former purchaser, and the mortgagee subsequently takes a new mortgage upon the portion of the lot first conveyed, with notice, the purchaser of the second lot may maintain a bill in equity to redeem the same without contribution towards the debt secured by the first mortgage.

BILL IN EQUITY to redeem land from a mortgage. Upon agreed facts, which are sufficiently stated in the opinion, the

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bill was dismissed, and the plaintiff appealed to the whole court.

B. Dean & S. H. Folsom, for the plaintiff.

W. P. Harding, for the defendants.

Hoar, J. This case differs in only one respect from that of *Bradley* v. *George*, 2 Allen, 392; and this is rather a difference in form than in principle. The defendant Mrs. Prescott holds a mortgage of $500 upon the whole tract of land, and has taken possession for the purpose of foreclosure. Subsequently to the making of that mortgage, the mortgagor conveyed a part of the land, with the agreement recited in the deed of conveyance that the grantee should, as a part of the consideration, assume and pay the whole mortgage. Afterward the mortgagor conveyed the remainder of the land to the plaintiff in fee, not covenanting against the mortgage, but with an express understanding that the mortgage was to be paid in full by the previous purchaser. Mrs. Prescott has now become the mortgagee of the first part, by a new mortgage for $1200; and it is conceded by the counsel, though not expressly found in the statement of facts, that the value of that part is much more than sufficient to pay the $500 mortgage.

In *Bradley* v. *George*, the first conveyance of a part of the land by the mortgagor, after the mortgage of the whole, was by a deed of warranty; and the mortgagee of the whole afterward took another mortgage of the remaining part. It was held that the deed of warranty exempted the land described in it from contribution to payment of the mortgage, as between the mortgagor and his grantee; and that neither the mortgagor himself, nor any person claiming title under him to the remaining part of the land, with notice, could claim such contribution. The right of the mortgagee, as such, to enforce the security against the whole mortgaged premises was not questioned. But if the mortgagee became also owner of the equity of redemption of that part of the land which, as between the mortgagor and his grantees, was chargeable with the whole amount of the mortgage, then in this latter capacity equity would require him to make the exemption of the other effectual, if it could be

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made so consistently with the full satisfaction of his mortgage.

In the case at bar, the exemption of the plaintiff's part of the land from contribution does not arise from a deed of warranty to him, leaving the whole burden to rest on the other part, but from an express annexation of the whole to the other part by contract, before the plaintiff purchased. Mrs. Prescott took a mortgage of the equity of redemption of the part to which the payment of the whole original mortgage belonged, with full notice of the arrangement; and the reason on which the decision in *Bradley* v. *George* is founded would therefore seem to be fully applicable. The deed of warranty of a part does not of itself directly create a lien on the remainder for the amount of the mortgage; but equity recognizes the contract of the mortgagor as binding upon any subsequent purchaser who acquires a title with knowledge of his grantor's agreement. See *George* v. *Kent*, 7 Allen, 16.

The general doctrine is established in *Chase* v. *Woodbury*, 6 Cush. 143, and has been recently fully considered, with an examination of many of the authorities, by the supreme court of New Hampshire, in the case of *Brown* v. *Simons*, 44 N. H. 475.

Decree according to the prayer of the bill.

LYDIA S. GRIMES *vs.* ISAAC KIMBALL.

If a mortgage of real estate has not been discharged, but the mortgagor has obtained possession of the same with the note which it was given to secure by fraudulently inducing the mortgagee to accept in payment of the note other securities which are worthless, the latter may maintain an action to foreclose the mortgage against one who has purchased a title to the premises of the mortgagor in ignorance of the transaction between him and the mortgagee; although such purchaser has paid money to discharge a new mortgage upon the premises executed by the mortgagor to one who took the same relying in good faith upon the fraudulent payment to the original mortgagee.

WRIT OF ENTRY to foreclose a mortgage of real estate.

At the second trial in the superior court, before *Lord*, J., after

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the decision reported in 3 Allen, 518, it appeared that the plaintiff, as executrix of David W. Grimes, held a mortgage of the demanded premises to secure a note for $1000 from Emerson Gardner, who, in November 1855, obtained possession of them by giving to her a new note and mortgage. It was in controversy whether this surrender was procured through the fraud of Gardner, and whether or not the mortgage had a discharge written upon it; but it appeared that his object was to enable himself to convey the premises free from incumbrances; that the plaintiff understood this to be his purpose; that she surrendered to him the note and mortgage to enable him to make such conveyance; and that he procured a loan from a loan and fund association, secured by a mortgage of the premises, upon producing to them the original note and mortgage. No further facts were reported in the bill of exceptions.

The judge ruled that "if Gardner gave the new note and mortgage, and took the old note and mortgage, for the purpose of being able to convey the estate free from all incumbrances, and the plaintiff, with full knowledge that such was his purpose, and intending to enable him to do so, gave up the old note and mortgage and took the new ones instead, and if the loan and fund association in good faith, upon the production by Gardner of said note and mortgage, and without knowledge of any fraud, lent money upon the estate, taking a mortgage, and then said Gardner sold the estate, and the defendant in good faith and without notice purchased the estate, and paid the mortgage to the association and the balance to Gardner, the title of the defendant would be good against the said Grimes's mortgage, although the consent of the plaintiff to the arrangement between her and Gardner, and the surrender of the note and mortgage by the plaintiff, and the taking of the new note and mortgage, were obtained and brought about by the fraudulent misrepresentations of Gardner, even if there was no written discharge upon the mortgage, and the mortgage was undischarged on the record, and although the new note and mortgage were given to the plaintiff in her own right in matter of form, while the previous note and mortgage were given to her testator."

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The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

D. S. Richardson, for the plaintiff, cited *Grimes* v. *Kimball*, 3 Allen, 518; *Ryerss* v. *Farwell*, 9 Barb. 618; *Taylor* v. *Ely*, 25 Conn. 250; *Copeland* v. *Copeland*, 28 Maine, 525.

T. H. Sweetser & A. P. Bonney, for the defendant, cited *Eaton* v. *Whiting*, 3 Pick. 488; *Somes* v. *Brewer*, 2 Pick. 184; *Rowley* v. *Bigelow*, 12 Pick. 312; *Holman* v. *Bailey*, 3 Met. 55; *Hoffman* v. *Noble*, 6 Met. 68; *White* v. *Garden*, 10 C. B. 919.

Merrick, J. The ruling of the presiding judge cannot be sustained. It has already been adjudged, upon a former hearing in this case, that, assuming it to be true that the parties intended that the note given by Gardner to the plaintiff should be accepted and operate as a payment and satisfaction of the note previously given by him to her testator, David W. Grimes, and that in pursuance of such intention and purpose she surrendered and gave up to him the last mentioned note, and also the mortgage deed which she held as collateral security, she would have a right to avoid the contract by showing that she had been nduced to enter into it by his false and fraudulent representations; and that upon proving such fraud, and her consequent rescission of the contract, she would be entitled to recover possession of the mortgaged premises as a means of enforcing the payment of the debt intended to be secured by it, if the deed had been duly recorded and the mortgage had never been released or discharged. And it was also further adjudged that if the defendant had no information or knowledge of or concerning the transactions between Gardner and the plaintiff, or that she had ever delivered or given up to him the said first mentioned note and mortgage, his right in reference to his title to the premises acquired by purchase of the estate of Gardner would be affected by the constructive notice to him resulting from the record of the apparently undischarged mortgage deed from Gardner to Grimes. *Grimes* v. *Kimball*, 3 Allen, 518. These determinations, which, upon reëxamination, appear to us to have been perfectly correct, very clearly indicated the established

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rule of law which should have been applied by the presiding judge to the facts stated in his ruling, and assumed by him as a basis upon which to predicate his instructions to the jury. Upon the facts and circumstances so stated, the title of the defendant to the demanded premises was not good against the claim of the plaintiff under said deed to her testator. After his decease, upon the probate of his will and her acceptance of the office and trust of executrix under it, the mortgaged premises and the debt thereby secured became personal assets in her hands, to be administered and accounted for as a part of his estate. Gen. Sts. *c.* 96, § 9. Rev. Sts. *c.* 65, § 11. If she never released or discharged the mortgage, the legal title to the premises conveyed by the deed remained in her; and when she rescinded the contract which she had entered into with Gardner, under the influence of his fraudulent representations, she was entitled to insist upon having possession of the mortgaged estate for the purpose of obtaining payment of the note which was still due from him.

The conveyances by Gardner to the loan and fund association in mortgage, and to the defendant in fee, were made under very different circumstances. In the former case the note and mortgage which he had given to Grimes, and which he had induced the plaintiff to deliver and give up to him that he might make a conveyance of the mortgaged premises free and clear of all incumbrances, were exhibited to them by Gardner to satisfy them that the estate was in fact unincumbered, before they consented to make him a loan, or to advance to him money upon the proposed security. Perhaps upon the general and equitable principle that when one of two equally innocent persons must suffer by the fraudulent acts or misconduct of a third party, the loss resulting therefrom should be borne by him who, by misplacing confidence in the wrongdoer, has enabled him to commit the injury, rather than upon a stranger who has conducted fairly and in good faith in the ordinary course of business, the plaintiff, having put the note and mortgage into the hands of Gardner to enable him to make a conveyance of the mortgaged premises free from incumbrance, might be estopped

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from setting up or asserting her title against the loan and fund association. But the circumstances attending the sale of the premises to the defendant will not justify, nor do they afford any occasion for, the application of this principle. No exhibition of the former note and mortgage was made to him to induce him to become a purchaser, or to satisfy his mind that he could acquire by a deed from Gardner an unincumbered title. He knew nothing of the contract between Gardner and the plaintiff, or of any act or transaction which had occurred in pursuance of it, and therefore he could not have been misled or influenced by the delivery and surrender of the former note and mortgage by her to him. He appears to have relied wholly upon the representations of Gardner, whatever they were, and to have made no further inquiry in relation to the state of the title to the land which he purchased. He took no assignment from the loan and fund association, but, applying part of the purchase money to the payment and satisfaction of their debt and mortgage, paid the residue of it directly to Gardner, and took a deed of the premises from him. But the note to Grimes had never been paid, the mortgage given to secure it was in fact undischarged, and the record gave constructive notice to the defendant that it was still in force as an existing incumbrance. Against him, therefore, the plaintiff has a right to insist upon her legal title. Upon the state of facts embodied in the ruling of the presiding judge, he should have instructed the jury to this effect. The ruling having been otherwise, the exceptions of the plaintiff must be sustained.

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ATKINSON C. VARNUM *vs.* SAMUEL MESERVE.

A power of sale contained in a mortgage of real estate may be executed after the mortgagor's death.

If such power of sale, so executed, provides that the surplus of the proceeds, after payment of the debts and expenses, shall be paid to the mortgagor or his assigns, his executor may maintain an action therefor, although the mortgagor by will devised the land to others; and, upon recovery of it, will hold the same in trust, first, to the use of the widow, so far as she may be entitled thereto, in preference to creditors; secondly, for the payment of debts; and thirdly, to the uses of the will.

If such power provides that the mortgagee may retain all costs and expenses of the sale, he may retain a reasonable sum paid for legal advice respecting it, and also for his own time and trouble.

HOAR, J. The plaintiff is the administrator with the will annexed of Patrick Manice, who made a mortgage with a power of sale to the defendant, his wife joining in a release of dower and homestead. The mortgage debt being due and unpaid, the defendant advertised the mortgaged estate for sale, according to the requirements of the power of sale; but before the advertisement had been published the requisite number of times, the mortgagor died. By his will, the real estate was devised to his wife for life or widowhood, with remainder to his brothers and sisters. The mortgagee proceeded to complete the sale after the death of the mortgagor; and after satisfying the mortgage debt, and paying the expenses attending the sale, there is a surplus left in his hands, to recover which this action is brought.

The widow of the mortgagor had a right of homestead in a part of the premises included in the mortgage. The rest of the estate of the mortgagor is not sufficient for the payment of his debts; but if the plaintiff can recover the sum which he claims from the defendant, he will have a surplus remaining in his hands, to be distributed or paid to the parties who may be entitled to it.

Upon these facts, it was held at the trial that the plaintiff could not recover; and the first question raised by the bill of exceptions is, whether the sale of the estate by the defendant was valid to pass the absolute title to the property. The objection is, that the death of the mortgagor extinguished the power.

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By the power of sale the mortgagee, his executors, administrators or assigns, were authorized to sell the mortgaged premises, and "in his or their own names, or as the attorney of the grantor," to convey the same absolutely and in fee simple to the purchaser; and out of the proceeds to retain sufficient to discharge the mortgage debt, with all costs and expenses, paying the surplus if any to the mortgagor or his assigns.

The question thus presented was argued, but not decided, in the case of *Brewer* v. *Winchester*, 2 Allen, 389; and we believe has not before been judicially determined in this commonwealth. But when the power of sale is to be executed in the name of the mortgagee, we can have no doubt that it may be executed as well after the death of the mortgagor as before. It is a power coupled with an interest; and not merely an interest in the proceeds of the property for the sale of which the power is given, but in the property itself. Strictly speaking, a mortgage vests the whole legal estate in the mortgagee. His title to the land is complete as a legal title, and the power of sale is to relieve him of the equities attached to the mortgage. The power is to be executed out of the estate conveyed, and is not merely collateral to it. *Hunt* v. *Rousmanier*, 8 Wheat. 174, 203. 1 Parsons on Con. 62. *Wright* v. *Rose*, 2 Sim. & Stu. 323. *Clay* v. *Willis*, 1 B. & C. 364.

The strongest form in which the objection to the execution of the power is stated is that which points out the difference between the two estates of mortgagor and mortgagee, each of which is regarded, for some purposes, as a separate legal estate. Until the sale under the power, the equity of redemption remains in the mortgagor, and may be sold or devised by him, or inherited from him, as if the power did not exist. It is only subject to be extinguished by the execution of the power. It is therefore urged that the power of sale can only be considered as a power of attorney; and that the conveyance of the equity of redemption must be made by a separate instrument from that which transfers the mortgagee's estate; because the equity of redemption remains in the mortgagor after he has made the mortgage and the power. But this objection would be equally

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valid against any conveyance under the power in the name of the mortgagee. If such a conveyance can be sustained, (and it is too late to question that,) it must be held to operate as a mode of foreclosure provided by contract of the parties, so just and equitable in its provisions that it receives the sanction of courts of equity, and taking effect in a manner somewhat in the nature of a power of appointment.

The remaining question is one of more difficulty. The testator died seised of the equity of redemption. His widow's homestead right in a part of it attached; a right paramount to the claims of creditors. If she had waived the provisions of the will, her right of dower in the equity of redemption of the remainder would also have been a right which she could enforce in preference to creditors. As devisee for life, she became seised of the whole premises, subject only to the mortgage. There is, then, no doubt that when the power of sale is executed, equity will regard the surplus in money, after paying the mortgage debt and expenses of sale, as belonging to the persons who were entitled to the equity of redemption. If the sale had been made in the lifetime of the mortgagor, the change from real into personal property would have been complete, and the proceeds would have been a part of his personal estate, to be received and administered as assets by his executor or administrator. While it remained as real estate after his death, it was subject to his debts, and could have been sold under a license to his executor or administrator for the payment of debts, if required for that purpose. If, after such a sale, the mortgagee had executed the power, the surplus would clearly in equity have belonged to the purchaser at the administrator's sale. But the right of such a purchaser, as well as the paramount right of the widow in the homestead, which the administrator could not sell, would be only equitable rights, and ordinarily to be enforced by the aid of a court of equity. The right of the mortgagor's personal representative is direct under the contract. There is no assignment of the equity which can prevent the exercise of this right. And under the authority of *Buttrick* v. *King*, 7 Met. 20, which is a case very much in point, we think this action may

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be maintained. Whatever is recovered will be held by the plaintiff in trust, 1, to the use of the widow so far as she is entitled in preference to creditors, 2, for the payment of debts, and 3, to the uses of the will.

The advertisement of the sale was precisely in conformity with the requirement of the mortgage; and the expenses for which the defendant asks allowance do not seem objectionable.*

Exceptions sustained.

D. S. Richardson & G. F. Richardson, for the plaintiff.

T. H. Sweetser, (*W. S. Gardner* with him,) for the defendant.

LOUISA ELLIS *vs.* SANFORD DRAKE & others.

An entry by a mortgagee upon mortgaged premises, made, certified and recorded as provided in Rev. Sts. c. 107, § 2, will have the effect to foreclose the mortgage, after the expiration of three years, although the entry was purposely made in secret.

BILL IN EQUITY setting forth that on the 18th of February 1860 the plaintiff purchased and took an assignment of a mortgage of certain real estate in Holliston, which was under a prior mortgage to Timothy Daniels to secure a certain indebtedness to him; that before or on the 13th of May 1858 Daniels agreed to assign his mortgage to an agent of the defendants, and in the night of the same day took a formal possession of the premises under the statute, in the presence of two witnesses, for the purpose of foreclosure; that on the 17th of the same month he assigned his mortgage, in pursuance of his agreement, and the defendants now claim that the foreclosure has become absolute; but that the possession so taken was secret, collusive and

* One item of thirty dollars for legal advice and making the deed, and another of twenty dollars for the mortgagee's own time and trouble in relation to the sale were included; and were found by the judge before whom the case was tried, without a jury, in the superior court, to be reasonable in amount.

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fraudulent, and without notice to the plaintiff; that the defendants have never been in the actual possession of the premises; and that it was agreed at the time to keep the matter a secret The prayer was that the plaintiff might be allowed to redeem, and for further relief. The defendants filed a general demurrer.

A. Hemenway, (*L. H. Wakefield* with him,) for the defendants, cited *Lennon* v. *Porter*, 5 Gray, 318; *Bennett* v. *Conant*, 10 Cush. 163.

W. Lovering, for the plaintiff, cited *First Mass. Turnpike Corp.* v. *Field*, 3 Mass. 201; *Thayer* v. *Smith*, 17 Mass. 429; *Homer* v. *Fish*, 1 Pick. 435; *Gordon* v. *Lewis*, 1 Sumner, 527.

Dewey, J. The counsel of the parties have argued this case upon the assumption that the bill sets forth that the certificate of an entry by Timothy Daniels for breach of condition of the mortgage, signed by two witnesses, had been recorded in the office of the registry of deeds, in accordance with the provisions of Rev. Sts. *c.* 107, § 2. But the bill contains no such averment. It sets forth an entry in the night time of the 13th of May 1858, and a formal possession taken under the statute to foreclose the mortgage, and then proceeds to aver that the possession was collusive, not publicly taken, but agreed to be kept secret; that no notice was ever given to the plaintiff of the proceedings, and that the defendants have never been in the actual possession of the premises.

Such an entry and taking of a formal possession, with nothing more, would not operate to foreclose this mortgage. It was at least necessary that a certificate of two competent witnesses to such entry should be made and sworn to before a justice of the peace and recorded within thirty days after the entry in the registry of deeds where the mortgage was recorded. No such fact being alleged, the plaintiff does not show by her bill that the mortgage was foreclosed, and her right of redemption barred. In this state of the case, the demurrer filed on the part of the defendants cannot be sustained.

If the question, however, be whether an entry made in the presence of two witnesses, duly sworn to before a justice of the peace, and duly recorded in the registry of deeds, would

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operate as a foreclosure if attended with the circumstances alleged in this bill, it becomes necessary to consider more particularly what is required by the Rev. Sts. *c.* 107, § 2, and the judicial decisions thereon, to foreclose a mortgage. That such certificate was duly made and recorded appears from other papers in the case.

In the case of *Swift* v. *Mendell*, 8 Cush. 359, it was said by this court that the Revised Statutes "provide that the certificate constituting the evidence of an entry to foreclose shall be recorded, for the information of all parties examining the title." In *Bennett* v. *Conant*, 10 Cush. 167, it was further said: "This is a full and authoritative notice to all persons of the fact and date of the mortgagee's peaceable entry with the knowledge and consent of the mortgagor, of the cause of such entry for breach of condition, and of his purpose to foreclose." The case of *Lemon* v. *Porter*, 5 Gray, 318, is still more explicit, saying: "The object of this provision is to give notice to all persons concerned;" and further: "Since the provision in the Rev. Sts. *c.* 107, § 2, for recording the evidence of the entry of the mortgagee, this must be considered constructive notice, by which all persons may ascertain the relation which the prior mortgagee holds to the property; and the mortgagor, and all claiming under him, are conclusively prevented from holding adversely to his paramount right."

Upon looking at the averments in this bill, it will be seen that the leading position taken and relied upon to avoid the foreclosure is, that the entry was a secret one, and designedly so. That any publicity should necessarily be given to the entry can hardly be affirmed, since it may be made upon any small portion of a large tract of land, and, in the case of a mortgage of two separate parcels of land, by an entry on one of them, as was held in one of the cases already cited. Permitting the mortgagor to continue in the occupation of the premises is also held not to defeat the operation of an entry for foreclosure. The rule of law as now held seems to be that the entry by the mortgagee for condition broken, in the presence of two witnesses, and a certificate thereof duly sworn to before a justice

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of the peace, and duly recorded, are all that is necessary to effect a foreclosure.

As to the mortgagor or those who may hold his equity of redemption, they know, or are bound to know, the existence of the mortgage, and the condition thereof; and knowing that mortgages may be foreclosed by an entry under the provisions of the statute, if not redeemed in three years after such entry, they are bound to inquire and ascertain by the public records whether such entry has been made, and govern themselves accordingly. The same is true of other parties who are about to become interested in the estate by purchase or otherwise. To all such, the record in the registry of deeds is the notice of the entry for foreclosure. We think, therefore, that the fact that the entry was more or less public, or that the same was attended by circumstances adapted for concealment, is of no importance, if the certificate of such an entry is duly sworn to and recorded. This registered certificate furnishes ample means to guard against surprise or concealment, as such record must exist three years, lacking thirty days, before a foreclosure can take effect.

As to the complaint that no actual notice of the making of such entry was given to the party now seeking to redeem, the ready answer would seem to be that it was no part of the duty of the mortgagee to give her any such notice, as she did not become connected with the estate, or acquire any right of redemption thereof, until more than a year after the entry had been made. So also the alleged purpose of the mortgagee at the time of the entry to conceal it could have no reference to the plaintiff, for the like reason.

The plaintiff, having acquired her title by a conveyance made to her on the 18th of February 1860, had therefore, by force of the certificate, if one was duly recorded in the office of the registry of deeds in May 1858, as is assumed by the parties, constructive notice of the entry to foreclose the mortgage, and was bound to act accordingly, and to proceed to avail herself of her right to redeem within the three years allowed by the statute.

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GEORGE W. WELCH *vs.* JONAS H. PRIEST.

The title of a mortgagee to land may be conveyed by a deed of release duly executed and recorded, to one who has no notice of a prior unrecorded assignment of the mortgage

WRIT OF ENTRY to recover a lot of land in Waltham.

It was agreed that William A. Bates, being the owner of the demanded premises and another lot of land, mortgaged them both to Samuel Hobbs, who afterwards assigned the mortgage to the demandant. Before the assignment was recorded, Bates conveyed the equity of redemption and Hobbs executed a deed of release of the demanded premises to G. M. Whitten, who received the same and caused them to be recorded in good faith, for a valuable consideration, and without notice of the assignment. These deeds were duly recorded, and Whitten's title afterwards passed to the tenant by mesne conveyances, which were executed after the assignment to the demandant was recorded.

Upon these facts judgment was rendered in the superior court for the tenant; and the demandant appealed to this court.

J. Rutter, for the demandant.

T. H. Sweetser & G. A. Somerby, for the tenant, were not called upon.

HOAR, J. Under the decisions in this commonwealth, the estate of a mortgagee of land is a legal estate, which passes by the same instruments of conveyance as other legal estates. This legal estate can be assigned or transferred by deed acknowledged and recorded; and, by a special statute provision, it may be discharged by an entry signed by the mortgagee, his executor, administrator or assignee, upon the margin of the record in the registry of deeds, acknowledging the satisfaction of the mortgage. The statute provides that "such entry shall have the same effect as a deed of release duly acknowledged and recorded." Rev. Sts. *c.* 59, § 33; Gen. Sts. *c.* 89, § 30. The implication is very strong that a release by deed acknowledged and recorded is a complete conveyance of the mortgagee's title.

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And we think sound policy requires that it should be so regarded. It is as important to be able to ascertain from the registry the existence or continuance of a mortgage, as of any other legal title. Not unfrequently the whole or part of an estate held in mortgage is released or conveyed, when the debt is not paid. And in the absence of fraud, a conveyance by the party who appears on the record to be the owner of the mortgage should be sufficient to protect a purchaser who has no actual or constructive notice of title in any other.

Judgment for the tenant.

THOMAS SHERIDAN *vs.* PATRICK WELCH.

Exclusive possession of land by a mortgagor, with a claim of exclusive ownership, does not in itself amount to a disseisin of the mortgagee, so as to invalidate a transfer of the mortgage title or prevent the valid execution of a power of sale contained in the mortgage.

WRIT OF ENTRY to recover a parcel of land in Waltham.

It was agreed that in January 1855 Michael O'Halloran, being the owner of the demanded premises, conveyed them to the Waltham Mutual Loan and Fund Association by a mortgage containing a power of sale; that in April 1856 O'Halloran conveyed the premises to the tenant, who has since been in the exclusive possession thereof, with a claim of exclusive ownership; and that in May 1862 the mortgagees sold and conveyed the premises under their power of sale to one Gorman, who has since conveyed the same to the demandant.

Upon these facts judgment was rendered in the superior court for the demandant, and the tenant appealed to this court.

J. Rutter, for the tenant.

J. Q. A. Griffin, for the demandant.

HOAR, J. Exclusive possession by a mortgagor or those claiming under him, with a claim of exclusive ownership, does not in itself amount to a disseisin of the mortgagee, so as to invalidate a transfer of the mortgage title. There is nothing in

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the agreed statement of facts to show that any claim adverse to the mortgage was known to the mortgagee, and the facts do not show that he was disseised. A conveyance by virtue of the power of sale in the mortgage would therefore give a good title to the purchaser, upon which he could maintain a writ of entry against the grantee of the mortgagor.

The statement of facts does not present any question upon the correctness of the proceedings under the power of sale, nor show that it was intended to raise any upon it.

Judgment for the demandant.

JOSHUA C. KIMBALL *vs.* JAMES M. HILDRETH.

Taking a bill of sale of personal property at a price less than its estimated value, with an agreement that the original owner shall have the same again at any time after a fixed day, upon refunding the price, with a small additional sum for trouble in trying to sell the same, amounts only to a pledge, which is lost by giving possession of the property to the general owner.

If on the undisputed facts a verdict was right, this court will not inquire into the correctness of the rulings under which it was rendered.

TORT for the conversion of a watch and chain. The answer denied the conversion, and the title of the plaintiff to the property; set forth the special contract of the plaintiff hereafter copied; and averred that the plaintiff borrowed the watch and chain from James M. Hildreth, Jr. for a temporary purpose, and wore them for several weeks, and then lent them to the defendant for a like purpose, and that James M. Hildreth, Jr. thereupon demanded them of the defendant, and that the defendant accordingly delivered them to him.

At the trial in the superior court, before *Rockwell*, J., it appeared that the plaintiff, being the owner of the watch and chain, delivered them, on the 2d of January 1863, to the defendant's son, James M. Hildreth, Jr., under the following contract, signed by the latter:

"Bought of J. C. Kimball one gold hunting case watch and a

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gold chain, for the sum of thirty-five dollars, with the agreement, and this is a part of this contract, that the said Kimball shall have the said watch and chain any time after three months by refunding the said sum of thirty-five dollars, and three dollars for his trouble in trying to sell said watch and chain. The value of said watch and chain is considered to be sixty dollars. Said Kimball shall take said watch and chain for said sum of thirty-five dollars and the further sum of three dollars within a reasonable time after said three months, if required."

At the same time, the plaintiff also signed the following paper:

"Having sold J. M. Hildreth, Jr. a watch and chain conditionally, I hereby agree to take it back at the end of three months and give him thirty-eight dollars, if he does not succeed in selling it so as to allow me fifty dollars for the watch and chain."

There was also evidence tending to sustain the facts set forth in the answer, and it was admitted that the watch and chain were delivered back to the plaintiff as therein averred, and that the plaintiff duly demanded the same after the delivery of them by him to the defendant.

The jury returned a verdict for the plaintiff, under instructions which are now immaterial; and the defendant alleged exceptions.

A. R. Brown, for the defendant.

D. S. Richardson & G. F. Richardson, for the plaintiff.

METCALF, J. The contract of January 2d 1863, between the plaintiff and J. M. Hildreth, Jr., was a pledge of the watch and chain to Hildreth, with a power in him to sell them for a stipulated sum.

To render a pledge valid as a security, there must be not only a delivery to the pledgee of the property pledged, but also a continued possession thereof by him. If he relinquish possession, the pledge no longer exists, but is extinguished or waived. Story on Bailm. § 287. *Eastman* v. *Avery*, 23 Maine, 250. *Russell* v. *Fillmore*, 15 Verm. 135. *Walcott* v. *Keith*, 2 Fost. (N. H.) 209. *Walker* v. *Staples*, 5 Allen, 34, and authorities there cited.

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It was admitted by the defendant, at the trial, that the watch and chain were delivered back by J. M. Hildreth, Jr. to the plaintiff. And there was evidence, which was not controverted, that the plaintiff wore the watch several weeks, and then lent it to the defendant. The pledgee, by delivering back the pledged property to the plaintiff, lost all his rights under the contract of pledge, according to the above cited authorities, and the plaintiff was thereby enabled legally to dispose of that property as if he had never pledged it. As he lent it to the defendant, who delivered it to his son, to whom it was formerly pledged, and refused to return it to the plaintiff on its being demanded of him, he made himself liable to this action, and the verdict was rightly returned against him.

The verdict being right, we need not decide whether the ruling and instructions under which it was found, and to which the defendant excepted, were or were not correct. 5 Mass. 10, 104. 7 Met. 275, 276. 8 Gray, 249. It is manifest from the answer filed by the defendant, and from the evidence introduced by the plaintiff, that the ground on which we uphold the verdict was not taken at the trial. *Judgment on the verdict.*

George L. Hunt *vs.* Lowell Gas Light Company.
Same & wife *vs.* Same.

In an action against a gas light company to recover damages for an injury to the plaintiff's health caused by an escape of gas from a main pipe in a public street, from which it passed through various sewers and drains into the cellar of the house and thence into the house occupied by the plaintiff, evidence is competent to show that all the other persons living in the same house, who had been in good health before the time complained of, afterwards became ill, for the purpose of showing the effect of the gas upon others who inhaled it at the same time with the plaintiff; and it is immaterial whether the injury was caused by inhaling gas of the defendants, or other gases from the sewers and drains which it set in motion, provided the plaintiff was not guilty of negligence, and the defendants were guilty of negligence.

There is no established form for questions to experts in this commonwealth, and any question may be proper which will elicit their opinions as to the matters of science or skill which are in controversy, and at the same time exclude their opinion as to the effect of the evidence in establishing controverted facts.

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Two actions of tort, tried together, against a gas light company for an injury to the plaintiffs' health from the inhalation of gas which escaped from the defendants' pipes.

At the trial in this court, before *Metcalf*, J., the evidence tended to show that the plaintiffs lived in New Hampshire, and on the 4th of February 1857 came to the house of Aaron Hunt in Lowell and remained there for nine days; that gas had escaped into the house under the circumstances stated in 1 Allen, 344, and the plaintiffs became ill, and returned home, where they were sick for several weeks. The plaintiffs were allowed to prove, against the defendants' objection, that up to that time the family of said Aaron had been in perfect health, and that immediately or soon after the escape of the gas into the house every member of the family became seriously sick; but no evidence of the particulars of the sickness of any of them was admitted.

The judge instructed the jury that the defendants were equally liable whether the plaintiffs were injured and made sick by the defendants' gas alone, or by gases generated in the sewer and drain through which it passed, if the same were carried by the defendants' gas into the house; provided they should find that the plaintiffs were not guilty of negligence, and that the defendants were guilty of negligence.

The plaintiffs called three physicians who had heard the testimony on the part of the plaintiffs, which was not conflicting, and asked each of them this question: "Having heard the evidence, and assuming the statements made by the plaintiffs to be true, what in your opinion was their sickness, and do you see any adequate cause for the same?" The defendants objected to this question, but the judge allowed it to be put, and the witnesses answered that "their sickness was of a low typhoid type, and that the breathing of gas, as stated by them, at the house of Aaron Hunt was the cause of it."

The jury returned verdicts for the plaintiffs, and the defendants alleged exceptions.

J. G. Abbott & W. P. Webster, for the defendants.

D. S. Richardson & A. R. Brown, for the plaintiffs.

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CHAPMAN, J. The plaintiffs were visitors in the family of Aaron Hunt at the time when the defendants' gas escaped into the house, and they were permitted to offer evidence that Aaron Hunt and his family had been in perfect health up to the time when the gas began to escape into their house, and that, immediately or soon after, every member of the family became seriously sick. The admission of this evidence is excepted to. But evidence of this character was held to be admissible in the case of Aaron Hunt against these defendants. 1 Allen, 344. The plaintiffs were not allowed to give evidence of the particulars of the sickness of any one of these persons; and it is objected that, if the evidence was admissible to any extent, the particulars should have been inquired into. But the sickness of these persons is a collateral fact, and is admissible merely for the purpose of showing the nature of the gas which came into the house, to the influence of which all the inmates were subjected alike. Evidence that the inmates of another house were made sick in consequence of inhaling the gas that escaped into their house from the same defect in the defendants' pipes has been held to be inadmissible. *Emerson* v. *Lowell Gas Light Co.* 3 Allen, 410. The evidence should be limited to the effect of the gas upon those who have in common, and under similar circumstances, inhaled it. How far the plaintiff shall be permitted to go into particulars in offering such evidence should depend somewhat on the circumstances of the case, and must, within reasonable limits, be left to the discretion of the presiding judge. If it falls short of proving that the gas caused the sickness of the other persons, it amounts to nothing. But it might be very unreasonable to permit the case to branch out into several collateral issues on such a point. We see no reason to think that the evidence was unreasonably restricted.

The next exception is to the instruction given to the jury that, whether the plaintiffs were made sick by the defendants' gas alone, or by the gas generated in the same drain through which it passed, if carried by the defendants' gas into the house, the defendants were equally liable, provided the jury should find that the plaintiffs were not guilty of negligence, and that the defendants were guilty of negligence.

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This instruction was clearly right. If, through the negligence of the defendants, a current of their gas was set in motion, and in its course through the sewer and drain it took up other gases which were noxious and carried them into the house, and the plaintiffs were made sick thereby, the defendants' negligence was as much the proximate cause of the injury as if their own gas had occasioned it. It would be like the case of a mill owner who should negligently suffer his dam to give way, whereby the meadow of his neighbor below him is overflowed. If the flood should in its course take up stones and gravel, and carry them upon the meadow, the mill owner would be liable as well for the damage caused by the stones and gravel as for the damage caused by the water, on the ground that the whole injury was alike the proximate consequence of his fault.

The third exception is to the question put to the experts, and the answer thereto. The form of question stated by Shaw, C. J. in *Woodbury* v. *Obear*, 7 Gray, 467, is not to be regarded as an exclusive formula. It is put by way of example, and is well adapted to all cases where the evidence is conflicting or complicated. The object of all questions to experts should be to obtain their opinion as to the matter of skill or science which is in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. Questions adapted to this end may be in a great variety of forms. If they require the witness to draw a conclusion of fact, they should be excluded. The question put in *Sills* v. *Brown*, 9 C. & P. 601, was of this character, and was rightly excluded. But where the facts stated are not complicated, and the evidence is not contradictory, and the terms of the question require the witness to assume that the facts stated are true, he is not required to draw a conclusion of fact. In the present case, the question allowed to be put does not seem to us to require of the witnesses anything more than a scientific opinion; and we do not understand the answer to include anything more than this. *Exceptions overruled.*

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Peter Hubbell *vs.* George W. Warren.

If a bill in equity is brought in behalf of the plaintiff and such others having a like interest as may come in to prosecute the suit, and no others come in, the plaintiff, in order to maintain his bill, must show that he is himself entitled to equitable relief.

If no permanent restriction upon the use of an estate is created by deed, a court of equity will not imply one under an alleged independent agreement, unless such agreement is clearly established.

A simple agreement between the owners of adjacent estates for the erection of buildings thereon in a uniform manner, and at a certain distance from the street, does not by implication require that the buildings shall thereafter remain in the same position or of the same size or shape as when erected.

If the owner of two adjacent lots of land conveys one of them subject to a condition that the buildings to be erected thereon shall be set back a certain distance from the street, and with a warranty that the premises are free from all incumbrances made or suffered by him, a previous mutual oral agreement between the grantor and grantee that they will set back the buildings to be erected by them a greater distance from the street cannot be enforced by one of them in equity.

Bill in equity brought by the plaintiff, in behalf of himself and such others having an alleged right in common with him as should come in to prosecute the suit, to restrain the defendant from building an addition to his dwelling-house on Monument Square, in Charlestown, within less than twelve feet from the street.

The bill alleged, amongst other things, that on the 3d of September 1846 the defendant conveyed to the plaintiff a parcel of land on said square, being the whole of lots numbered forty and thirty-nine, and a part of lot numbered thirty-eight, upon a lithographed plan, which conveyance was made "subject to all the conditions and restrictions set forth in the original deeds of Thomas B. Wales and others, trustees," &c., and in which the defendant covenanted that the premises were free from all incumbrances made or suffered by him; that said original deed contained the following condition: "And to the end that there may be an uniformity in the buildings to be erected fronting the said Monument Square, and for determining the character and style thereof, ... it is hereby declared that this conveyance is upon the conditions that all buildings at any time hereafter to be erected upon the granted premises shall be dwelling-houses

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not less than three nor more than four stories high, or buildings for religious or literary purposes; that they shall all be built of brick or stone, and shall be set back ten feet from the front line;" that the defendant owned lots adjacent to those conveyed by him to the plaintiff; that before the date of the said conveyance to the plaintiff, the plaintiff and the defendant had frequent conferences as to the style, size and general character and cost of the respective houses which they intended to build, and it was finally agreed that they should be substantially alike in size and plan, and be built in a block, each to have a wing, and that they should be set back twelve feet from the front line; that the plaintiff and the defendant accordingly built and in 1847 completed expensive houses upon their respective lots, set back twelve feet from the front line, and each with a wing set back about twenty feet from the front line of the house, and they have ever since continued to live in the same; that thereafter other persons erected houses upon the same side of Monument Square, all of whom at the solicitation of the defendant set back their houses twelve feet from the front line of their lots; and that now the defendant purposes and is taking steps to build an addition in front of the wing of his house which shall extend two feet in front of the main part of his house and of the line on which the houses of the plaintiff and others on that side of the square are built, which, if completed, will be a serious and irreparable injury to them.

The answer, amongst other things, admitted the conveyances, and denied the making of the oral agreement, as alleged, and averred also that such agreement, if made, was within the statute of frauds.

No other parties came in to prosecute the suit with the plaintiff.

At the hearing, before a commissioner appointed for that purpose, much evidence was taken which it is unnecessary to recite here, the material portions of it being sufficiently stated in the opinion. The case was reserved by the chief justice for the determination of the whole court.

I. F. Redfield & H. G. Hutchins, for the plaintiff. 1. It is well

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settled that an oral agreement relating to lands, if wholly or partly performed, is binding upon the parties notwithstanding the statute of frauds, and will be enforced in equity where its violation will be a fraud upon or produce irreparable injury to the other party. 1 White & Tudor's Lead. Cas. in Eq. (Amer. ed.) 719–746. *Piggott* v. *Stratton*, De G., Fisher & Jones, 33. The present case falls within this doctrine. See *Tallmadge* v *East River Bank*, 2 Duer R. 614. The parol agreement made in the present case creates an easement in every lot on that side of the square, for the free passage of light and air, and for a prospect over these additional two feet of front land, so far as the proprietors came into the arrangement; and as fast as the lots were built upon by any proprietor on this new line, twelve feet back, the contract was fulfilled on his part, and thus became irrevocable on the part of all the others. *Cincinnati* v. *White*, 6 Pet. 431. *New Orleans* v. *United States*, 10 Pet. 662. *Holdane* v. *Trustees of Cold Spring Village*, 21 N. Y. 474. 2. But a written agreement to the same effect was also proved. Before giving the deed, the defendant executed a bond to make the conveyance, provided the plaintiff should erect a house according to a certain plan therein referred to, according to which the houses of both plaintiff and defendant were to be built. It is now said that this agreement did not require that the houses should permanently remain as built. But they were to be of brick and stone, which imply permanence. And even if we admit that the restriction only extends to the continuance of these houses, the defendant would have no right to pull down his house and build it anew. 3. The plan referred to shows decisively that the agreement between the parties was that the houses should be set back twelve feet. Making a deed according to a plan is an estoppel. See *Cooke* v. *Banks*, 7 C. & P. 481; *Barclay* v. *Howell*, 6 Pet. 498. In this case the parties have built in conformity to the plan, and the line has been extended for a whole street. *Clark* v. *Martin*, 1 Amer. Law Reg. (N. S.) 479. The case of *Wolfe* v. *Frost*, 4 Sandf. Ch. 72, has been repeatedly disregarded. The contract, therefore, is established, first, as an oral contract; then, by the written agreement

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and lastly, by the reference to the plan. And, in view of this contract, the acts of the defendant amount to a fraud. Suppose that he had told the plaintiff of his intention to pull down this wing, and build up to within ten feet of the front line: would the plaintiff have consented? How did the defendant suppose that the plaintiff understood the agreement? Certainly he knew that the plaintiff understood the restriction to be perpetual.

S. Bartlett, for the defendant. 1. The supposed engagements of the defendant were prior in date to the bond and deed, and therefore must be deemed to have been merged. *Patching* v. *Dubbins*, Kay, 1. The deed contains a covenant against all incumbrances made or suffered by the defendant, and he could not enforce against the plaintiff any oral agreement of the character set up in the bill. Is the defendant bound, and the plaintiff free? 2. Assuming, for the argument, that there was a distinct oral agreement that the houses should be set back twelve feet, and forever maintained there, such an agreement does not carry with it an easement, but falls within the statute of frauds, unless withdrawn from its operation by the principles applicable to part performance. *Wolfe* v. *Frost*, 4 Sandf. Ch. 72. *Tallmadge* v. *East River Bank*, 2 Duer R. 614; S. C. *nom. Maxwell* v. *East River Bank*, 3 Bosw. 124. And if such agreement be executory or uncertain, the statute applies to it, although a part may have been performed. *Phillips* v. *Thompson*, 1 Johns. Ch. 131. *German* v. *Machin*, 6 Paige, 288. *Colson* v. *Thompson*, 2 Wheat. 336. 3. The testimony certainly does not establish that the two feet in question should be forever subject to a servitude. To establish a permanent servitude, a clear and distinct agreement should be shown. See *Wolfe* v. *Frost*, *ubi supra*. In this case, the evidence as to the terms of the agreement is conflicting; but there is no evidence to prove a permanent servitude. 4. If the plaintiff is shown to have no rights, there is an end of the suit. Adams on Eq. 258.

Bigelow, C. J. This bill is brought by the plaintiff for the benefit of himself and of all other persons whose estates are similarly situated with his own on the same street, and are

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entitled, as he alleges, to the same right or privilege as that which he sets up as belonging to the premises which are owned and occupied by himself. But as no other person has actually come in to prosecute the suit jointly with the plaintiff, it stands like a creditor's bill, and he is to be regarded as *dominus litis*. As the case is now presented the bill cannot be maintained, unless satisfactory evidence is offered of a right in him to equitable relief. Adams on Eq. 258. The control of the suit is with him as the actual plaintiff, and its determination on the present hearing must depend on the nature of the case which he has established by his proofs. On looking at the allegations in the bill, it is apparent that the sole ground on which his claim to relief rests is, that there was an agreement between himself and the defendant, not only that the houses described in the bill and belonging to them respectively should be erected on a line twelve feet distant from the street in front thereof, but that the space between said line and the street should forever remain open and unincumbered by buildings or other erections which might tend to obstruct the view or hinder the free passage of light and air over that portion of said space which belongs to the respective parties. In other words, the plaintiff alleges that he has by such agreement obtained as against the defendant a perpetual right, in the nature of a servitude or easement, over the piece of ground lying in front of the defendant's house, and between it and the street, by virtue of which he can insist that no building shall be erected thereon, and that the same shall be kept open for the benefit of the estate belonging to him. In regard to a portion of this space there is no controversy. By the deeds under which parties claim to hold their respective estates, it is made an express condition of the grant that all buildings erected on the premises shall be set back at a distance of ten feet from the line of the street. The dispute between the parties is only as to the other two feet of this space. In regard to this, the plaintiff maintains that there was an agreement entered into between the parties, not inserted in the deeds of the land, but a distinct and independent contract, made either orally or in

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writing, by which the alleged right or privilege over the remaining two feet was secured to him.

In the view which we have taken of the case, it is not necessary to determine whether a court of equity will enforce an oral agreement which has been executed concerning the mode of use and occupation of real estate, notwithstanding the provision of the statute of frauds, that no right or interest in land shall be created except by an instrument in writing. We are strongly inclined to the opinion that there may be cases in which the infraction of such an agreement by one of the parties to it, after it has been completely carried into effect, may operate as a fraud on others who have acted on the faith of it, and so constitute good ground for a claim to equitable relief. But no such question arises here. The difficulty with the plaintiff's case is not so much a defect in the kind of evidence which he offers to sustain it, as in a failure to show that any agreement, either oral or written, was entered into between himself and the defendant, by which he acquired the right or privilege which he sets up as the foundation of his title to the relief which he seeks. That an agreement between owners of adjacent lands, restricting the mode of its use and enjoyment, although not entered into in the form of a covenant or condition, or so framed as to be binding on heirs and assigns by virtue of privity of estate, may nevertheless create a right in the nature of a servitude or easement in the land to which it relates, which can be enforced in equity, is now well settled in this commonwealth. *Whitney* v. *Union Railway*, 11 Gray, 359. *Parker* v. *Nightingale*, 6 Allen, 341. But to establish such *quasi* servitude or easement, it must appear, either by express stipulation or necessary and unavoidable implication, that the parties intended to impose a permanent restraint on the use or mode of occupation of their respective estates. If such restrictions should be incorporated into a grant in the form of a condition or reservation, or appended to it as a covenant real, or so inserted as to carry with it a notice to all persons claiming title in the premises that the free use and enjoyment of them is to a certain extent qualified or limited, the intent to create a servitude or privilege in its nature perpetual

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would be clearly manifested. But where the agreement for such a right or interest in real property rests wholly in parol, or is in the form of a covenant in gross, or is entered into by a written contract separate and distinct from the deed or instrument by which the title is passed, it must contain a stipulation which in express terms provides that the right or privilege is to be a permanent restriction on the land to which it relates, or it must be so framed as to lead to the unavoidable conclusion that such was the intention of the parties; otherwise it would be destitute of the essential element of a servitude or easement designed as a perpetual burden on one estate for the use and benefit of another, and would be nothing more than an agreement for the immediate and present mode of enjoying or using the property, having relation to its situation and condition, and the purpose to which it was to be appropriated at the time when he agreement was made. If, for example, two persons owning adjoining lots of land, being about to erect dwelling-houses or stores thereon, should enter into a contract, either orally or in writing, that they would build them of similar materials and of uniform size and style of architecture, and would place them at a certain distance from the street, and in a designated position relatively to each other, such an agreement would not create any perpetual restraint on the use of the land by either of the owners. It would be completely satisfied and fulfilled, and the apparent intentions of the parties would be entirely answered, when the buildings were erected and finished according to the stipulated terms. Neither in law nor in equity could any design or purpose be imputed to the parties beyond that which was clearly expressed or necessarily implied from the agreement into which they had entered. The presumption of law as well as of sound reason would be in such case that the parties did not intend to give any greater permanence to the prescribed mode of occupying their land than might be secured by the nature of the structures which were about to be erected on the premises; and, if they were of a solid and durable character, that the owners would not be likely to change them essentially for a long period of years. But beyond this no right or privilege

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would be gained by such agreement. When the contemplated structures were erected in conformity to its provisions, the object which the parties had in view would be accomplished. No breach of the contract would be occasioned by either party or his assigns, if for their convenience or profit they should at any time afterwards take down the buildings and construct them in a different manner, or place them in different positions. It would be otherwise if there was a clear and distinct agreement, either express or implied, that the structures should always remain of the same size and shape, and on the same location. There would then be good ground for maintaining that all who took the estates with notice of such a stipulation should hold them subject to a duty or burden in the nature of a servitude for the benefit of the adjoining owner. But where there is no such agreement, there is nothing on which to found a claim to restrict an owner in the free and unqualified use and enjoyment of his estate.

In all the cases in the books, so far as we know, in which rights or privileges in the nature of servitudes or easements have been enforced in equity, the relief has been founded on agreements which expressly stipulated that the restriction on the use of the land should be permanent.

It seems to us, on a careful revision of the whole evidence in the case before us, that the agreement set up by the plaintiff, on which he bases his prayer for equitable relief, is not of this character. It amounts to nothing more than a stipulation between himself and the defendant that the buildings which they were about to erect on their respective lots should be built in a uniform manner, and be set back at a certain specified distance from the street. It was only a present agreement for the location and erection of the houses which the parties then had in contemplation. It contained no stipulation looking to future structures on the estates, or providing for a permanent or perpetual mode of using and occupying them. This is the fair result of the plaintiff's own statement of the verbal understanding between himself and the defendant in relation to the subject matter. The testimony of the defendant as to the written agreement which he gave to the plaintiff for the conveyance of

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the lot now owned by him falls far short of proving any stipulation concerning the permanent occupation of the premises. It tends to show only an agreement for the construction of the houses which the parties were then about to erect on their respective lots.

This view of the evidence is greatly strengthened by the fact that, when the deed of the plaintiff's lot was made by the defendant, no stipulation was inserted by which the plaintiff was bound to set his house back further than ten feet from the line of the street. The deed contained no other condition or clause restricting the owner in the use of the estate, except such as was inserted in all the deeds of estates lying on the square on which the premises in controversy are situated. If there was a previous mutual understanding that this restriction should be extended so as to embrace two feet more of space in front of the houses than was provided for in the original grants of land on the square, it certainly is most reasonable to suppose that the parties would have industriously labored to have it inserted in the deed. This was important for both parties: to the plaintiff, that thereby he might secure the alleged right or privilege over the defendant's lot; and to the defendant, that he should not by his covenants bar himself of a similar right in and over the lot conveyed to the plaintiff. The omission of any such clause is significant to show that no permanent right or easement for the mutual benefit of the parties over their respective estates was then understood to have been agreed on between them.

But this is not the only effect on the rights of the parties to this controversy which results from the terms of the deed of the plaintiff's land which he received from the defendant. It seems to us that this deed constitutes an insuperable objection to the maintenance of this suit. It not only does not contain any stipulation restricting the plaintiff from building over the two feet of space now in controversy between the parties, but it does contain an express covenant by the defendant that this part of the estate was free from all incumbrances made or suffered by him. By this covenant, the defendant would be effectually cut off from any right which he might have had

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under a previous oral or written agreement, even if any such had been proved to exist. He could not in the face of it insist that the plaintiff should not erect any building on his lot over the space of two feet immediately in front of his present dwelling-house. Against any claim of a right in the nature of a servitude or easement in the plaintiff's estate beyond a line ten feet distant from the street, the defendant's covenant would be a complete bar. By this deed, therefore, any mutual easement for the benefit of the two estates of the plaintiff and defendant, which might have been claimed under any previous agreement between them, was effectually destroyed. Its acceptance by the plaintiff was inconsistent with any such right, because it would leave the defendant's estate bound by the agreement for all time, while that of the plaintiff would be released from all the restrictions which the alleged agreement was designed to impose on it. To enforce the agreement under such circumstances, in favor of the plaintiff, would be contrary to its original purpose, and manifestly inequitable. *Bill dismissed.*

THEODORE H. MANSFIELD *vs.* BENJAMIN B. CONVERSE & another.

A. and B. entered into the following contract: "The stock entered on this book is delivered to A., to be made into men's split brogans, and returned to B. as fast as done at 87½ cents per pair, B. to advance on each case $15." *Held*, that the title to stock delivered to A. under this agreement, and entered upon the book, remained in B., and that it was immaterial that A. used some portion of it in making brogans for others, and other portions of it, together with stock of his own, in making brogans for B., without objection from the latter.

CONTRACT brought to recover for work done and stock furnished in making brogans.

At the trial in the superior court, before *Rockwell*, J., no evidence was introduced by either party, except the original and supplemental report of an auditor to whom the case had been referred, and who found the following facts:

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The parties entered into the following contract: "Boston, Nov. 15th, 1856. The stock entered on this book is delivered to T. H. Mansfield, to be made into men's split brogans, bound and unbound, 6–11, and returned to Buckman & Converse as fast as done, at 87½ cents per pair, they, B. & C., to advance on each case $15." Sundry items were entered upon the books, which, including items for cash advanced, amounted to $2446.46. The brogans and stock returned by the plaintiff to the defendants amounted to $2098.77. The brogans returned were not made wholly of stock received of the defendants; and some of the stock received of them was made into brogans which the plaintiff did not deliver to them, but sold to other parties. The stock delivered by them to the plaintiff did not include all the kinds of leather necessary for the manufacture of the brogans, and the plaintiff accordingly furnished such other stock as was necessary; and the auditor found that, though there was no express contract on the subject, the plaintiff was impliedly bound so to do. The plaintiff replaced in the brogans delivered to the defendants as much stock of his own, of like kind and quality, as he had used of theirs in brogans sold by him to others, and without objection from the defendants. The value at which the brogans were to be returned included both the materials and the cost of manufacturing. By a fire, which occurred without the plaintiff's fault, a portion of the stock so delivered by the defendants to the plaintiff, of the value of $726, was destroyed.

Upon these facts, the judge instructed the jury that the plaintiff was entitled to recover, and a verdict was accordingly returned for him for $378.36; and the defendants alleged exceptions.

J. G. Abbott & J. D. Ball, for the defendants, cited *Buffum* v *Merry*, 3 Mason, 478.

T. H. Sweetser, for the plaintiff, cited *Schenck* v. *Saunders*, 13 Gray, 37; *Stevens* v. *Cunningham*, 3 Allen, 491; *Sargent* v. *Metcalf*, 5 Gray, 306; *Merritt* v. *Johnson*, 7 Johns. 473; 1 Parsons on Con. 606, 611, 613.

Merrick, J. It appears from the report of the auditor that the brogans delivered by the plaintiff to the defendants amounted

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at the contract price to $2098.77. They had at different times furnished him with sundry parcels of stock at stipulated prices, which were to be manufactured into brogans and returned in that form to them; and they had also advanced to him divers sums of money, according to the agreement of the parties, as the brogans were from time to time received. The stock so furnished and the money advanced amounted in the whole to $2446.46. But a portion of the stock, of the value, at the prices charged in the account, of $726, was afterwards, while in the possession of the plaintiff, and before it was in any respect changed, destroyed by fire. But this loss was not caused by any fault or want of due care on his part. It is therefore obvious that, unless the title to the stock had changed and he had become the owner of it, there remained due to him for his services, and for the materials furnished by him in the manufacture of the brogans he had delivered, the sum for which judgment was rendered in the court below.

The defendants contend that the contract between the parties either constituted a conditional sale, or was an agreement for the sale and resale of all the stock which should be or which was delivered under its provisions by them to the plaintiff. But this certainly is not correct. No sale or transfer of the stock, or of any part of it, was designed or contemplated by either of the parties. The language of the written contract on this point is too plain and explicit to admit of any doubt or uncertainty. It is, that all the stock delivered to the plaintiff is to be made by him into split brogans, bound and unbound, and returned to the defendants as fast as done at 87½ cents per pair, they then to advance to him $15 on each case completed and delivered. This is wholly inconsistent with the idea of a sale or transfer of the property. The plaintiff could hold the stock delivered to him only for the single purpose of working or using it in the manufacturing of brogans, which, as soon as finished, were to be returned to the defendants. And they were entitled, immediately upon the completion of the brogans, to be repossessed of their property; in which event they would owe the plaintiff for his labor, and for the additional materials necessarily used

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in converting the stock into the manufactured article, the compensation stipulated for in the contract. The plaintiff was, therefore, a mere bailee for hire of the stock which he received, and, a part of it having been destroyed and lost in consequence of occurrences for which he was not responsible, he is not to be charged with its value or made accountable for it in the settlement of his account with the defendants. Story on Bailm. §§ 370, 423, 426, 437. *Schenck* v. *Saunders*, 13 Gray, 37. *Barrett* v. *Pritchard*, 2 Pick. 512.

It has no tendency, considered in reference to all the provisions of the contract, to show that there was a sale of the stock, that the parties agreed upon the prices to be charged for the several articles delivered to the plaintiff. Whatever was the price of each of the materials, they were all to be manufactured into brogans and returned to the defendants at a fixed and definite sum for each pair. The price of the materials supplied by them would therefore necessarily be deducted from the sum to be paid to the plaintiff, and his compensation or profits for labor bestowed would consequently be materially affected by the rate at which he should procure the stock to be delivered to him. This arrangement was evidently made to provide for determining the compensation of the plaintiff for his services, and not to affect or change the owership of the property.

It is immaterial, in reference to the question now in controversy, that the plaintiff had misapplied some portion of the stock which he received of the defendants, by making it into brogans for other parties. If he substituted for the portion so used an equal amount of his own, and the defendants were satisfied with the exchange, that would not affect the property which remained. Indeed, it does not appear that either of the parties intended that such exchange should alter their rights in any other particular. *Exceptions overruled.*

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JOHN BLODGETT & others *vs.* EPHRAIM HILDRETH.

If one tenant in common of land takes an assignment of a mortgage upon it, his co-tenants who derive their title as heirs at law of the mortgagor, cannot maintain a petition for partition against him, although the mortgage and assignment are not recorded.

PETITION FOR PARTITION of a tract of land in Townsend describing one half of the premises as owned by the respondent, or other persons unknown.

At the trial in the superior court, before *Morton*, J., it appeared that John W. Swallow, the former owner of the premises, died in 1840, intestate, leaving as his heirs at law Alice M. Swallow, Sophronia Swallow, Sarah S. Blodgett and Lucinda Hildreth; that thereafter Alice, Sarah and Lucinda conveyed their interest in the premises to Sophronia; that Alice then died, unmarried and childless; that Sarah then died, leaving children; that Sophronia then died, in 1854, leaving as her heirs at law Lucinda and the children of Sarah. The petitioners are the surviving children of Sarah, and the heirs of those who have died; and they claim to own one half of the estate.

It further appeared that in November 1837, John W. Swallow executed a mortgage of the premises to Jephtha Cummings, to secure a note for $344; that in 1839 this mortgage was assigned to John Cummings, whose executor in 1854 assigned it to Lucinda Hildreth, the respondent's wife; that in 1856 the respondent and Lucinda conveyed her interest in the land to one Reed, who on the same day transferred the same to the respondent by deed of quitclaim. Lucinda has since died. Various payments had been made upon the note, so that only about $40 remained due upon it at the time of the assignment to Lucinda. The mortgage and assignments and deeds to Reed and the respondent were not recorded till after the commencement of this petition.

There was also evidence tending to show that the conveyance to Sophronia by the other heirs of John W. Swallow was in trust for Lucinda; but this became immaterial.

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The judge ruled that the petitioners were entitled to maintain their petition, and directed a verdict accordingly; and reported the case for the determination of this court.

D. S. Richardson & T. H. Sweetser, for the petitioners. 1. When this petition was commenced, the records did not show any mortgage upon the premises, or any conveyance of Lucinda's share in the premises. The respondent now seeks to defeat the petition, as holder of an unrecorded mortgage. But assuming him to be tenant in common of one half, and holder of this mortgage upon the whole of the premises, one half of the mortgage is merged, and the other half only is held on the petitioners' interest, and, by Gen. Sts. *c.* 136, § 43, that interest is not affected by partition and cannot defeat the petition. 2. Sophronia took three fourths of the estate by purchase from the other heirs. At her death, the petitioners succeeded to their share of these three fourths as her heirs, and not as heirs of John W. Swallow; and therefore this unrecorded mortgage cannot be set up against them. 3. But if the petitioners were bound by the mortgage, they are not by the unrecorded assignments of it, which were between strangers. *Chase* v. *Woodbury*, 6 Cush. 143. *Newell* v. *Woodruff*, 30 Conn. 498. 4. Lucinda and the petitioners were jointly liable to pay the mortgage debt, and when she paid it and took an assignment of the mortgage, it discharged the land from the mortgage, and left to her the remedy of contribution. *Taylor* v. *Porter*, 7 Mass. 354. She, being a tenant in common, could not purchase the mortgage for her exclusive benefit. *Van Horne* v. *Fonda*, 5 Johns. Ch. 407.

W. P. Webster, for the respondent.

Dewey, J. The respondent held the title of Jephtha Cummings as mortgagee of John W. Swallow, and as such mortgagee, if the title be found to be a valid one, he may effectually defeat this petition for partition, while such mortgage is outstanding. *Fuller* v. *Bradley*, 23 Pick. 9. This title is held by the respondent under an assignment, and not as a discharged mortgage, giving rights of contribution as against co-tenants.

Various objections are taken to this title. 1. It is said that

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it was not recorded at the time of the decease of Sophronia Swallow, who held the same in part as heir at law, and in part by releases from her co-heirs. As against purchasers or attaching creditors of the mortgagor, this objection of want of registry might be fatal. But the mortgage was valid and effectual as against the mortgagor and his heirs, without such registry. Rev. Sts. *c.* 59, § 28. The mortgage deed was therefore valid as against Sophronia Swallow and her three sisters, whose only claim was that of heirs at law of John W. Swallow. The petitioners make no other title than one through Sophronia Swallow and other heirs at law, and can take no better title than the mortgagor had.

2. It is urged that the acquisition of the mortgage title by Lucinda Hildreth, while an owner of a moiety of the equity of redemption of the same, operated to discharge the mortgage, and only left in her the right to compel contribution from the other co-tenants of the equity. This mortgage was not paid, but merely assigned, and therefore raises no question of the right of the various parties to have this purchase treated as other than an assignment. If it operated as a merger as to the moiety of Lucinda Hildreth, it left the mortgage in full force as to the other portions of the estate, and this would be a sufficient foundation for the objection to the partition. The facts do not present the case provided for in Gen. Sts. *c.* 136, § 43.

3. It is then objected that one tenant in common cannot purchase an outstanding title, or incumbrance upon the joint estate, for his exclusive benefit, and assert the same to the prejudice of his co-tenant in any way. That principle cannot be properly applied to a purchase of an outstanding mortgage upon the joint estate. Such a title may temporarily enure to the benefit of a co-tenant who elects to make such purchase. But it leaves the other party in the full enjoyment of the right of redemption that he previously enjoyed. He may, as he would have been required to do in the case of the mortgage title remaining in the hands of a third person, pay the whole amount of the incumbrance, and be put in possession of the whole premises, unless the co-tenant elects to contribute his share.

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The respondent here sets up a valid title as assignee of the mortgagee, and this is sufficient to prevent the granting of this petition for partition. The fact that he has also an interest as part owner of the equity of redemption does not oust him of his higher and superior title as mortgagee.

In the present aspect of the case, it is unnecessary to consider the further question raised as to the alleged trust in Sophronia Swallow for and in behalf of the wife of the respondent, and how far that alone should defeat this petition. The result is, that the petition cannot be sustained.

Lowell Wire Fence Company *vs.* Edward M. Sargent & another.

Common carriers doing business between certain points, and not undertaking personally for the carriage of goods to any further points, but merely engaging to forward them to their destination through the established lines of transportation beyond, are not liable upon their receipt for a bill of goods "for collection" from a person beyond the termination of their route, in the absence of any special contract creating an additional obligation for the failure of other carriers, to whom in the ordinary course of their business the bill was intrusted for collection, to pay over the amount received by them upon the same.

Contract against common carriers for failing to collect and pay over to the plaintiffs a sum of money. At the trial in the superior court, before *Morton*, J., a verdict was returned for the defendants upon facts and under instructions which are sufficiently stated in the opinion. The plaintiffs alleged exceptions.

D. S. Richardson & B. J. Williams, for the plaintiffs, cited *Wareham Bank* v. *Burt*, 5 Allen, 113; 1 Parsons on Con. 685-690, and authorities there cited.

A. R. Brown, for the defendants, cited *Nutting* v. *Connecticut River Railroad*, 1 Gray, 502, and cases cited; *Brintnall* v. *Saratoga & Whitehall Railroad*, 32 Verm. 665.

Hoar, J. The plaintiffs sent by the defendants, who were expressmen between Lowell and Boston, a coil of wire fence

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directed to Annapolis, in Maryland, and gave them a bill for the price of the fence to collect from the person to whom the package was addressed; taking a receipt in these words: "Sargent & Morse, Boston Express. Office in Boston, 33 Court Square — Lowell, in the Depot. $37.50. Lowell, Dec. 10th 1855. Received of Lowell Wire Fence Co. for coll. on Dana Stewart, bill amounting to thirty seven dollars $\frac{50}{100}$. For Proprietors, F. Sargent." It appeared that the defendants delivered the fence and the bill to Adams & Co. in Boston, taking a receipt for it from them, and payment for carrying it to Boston, and that Adams & Co. carried the fence to Annapolis, and delivered it there to the person named in the bill, who paid the bill and the charges for freight to the agent of Adams & Co. There was evidence that it was the custom of the defendants to send all packages directed to places beyond Baltimore by Adams & Co. The money received on the bill was never paid over by Adams & Co. and this suit is brought to compel the defendants to pay it.

The court instructed the jury "that they were to determine what the contract between the plaintiffs and defendants was; that if the contract was to carry the fence to Boston and there deliver it to Adams & Co., then the defendants, upon safely carrying and delivering the fence to Adams & Co. at Boston, would thereby be discharged from all liability to the plaintiffs on account of said fence and the bill therefor from that time, and would not be liable for any loss or neglect on the part of Adams & Co., or for the amount of the bill, even if Adams & Co. had collected and held the money." The correctness of this instruction is the question presented by the bill of exceptions.

There was no express contract in relation to the transportation of the fence; and whether the implied contract was to carry it to Annapolis, or merely to carry it to Boston, and forward it thence by the ordinary lines of transportation, was certainly a question for the jury upon the whole evidence in the case; in determining which they would consider the nature of the business, the advertisements or notices given by the defendants, and all the circumstances tending to show the understanding

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of the parties. It was therefore properly left to the jury; and we can see no reason to think that they came to a wrong conclusion upon the evidence reported.

But no question is open as to the liability of the defendants as common carriers for the carriage of the fence, because that was carried and safely delivered according to its direction. It is only important to ascertain what the contract was, so far as it has any bearing upon the undertaking of the defendants to collect the bill which accompanied the article received for transportation.

It has been urged in argument by the counsel for the plaintiffs, 1, that the agreement to collect the bill was in writing, and should therefore have been construed by the court and not left to the jury; and 2, that Adams & Co. should have been held to be the agents of the defendants, for whose fidelity they were responsible.

We understand that the court did construe the written contract, but that the construction was an alternative one, depending upon the facts to be found by the jury to which the writing applied. The defendants by the receipt agreed that they received the bill for collection, and this was all. The duty and responsibility which this agreement created were yet to be determined, and would depend upon other facts not apparent on the face of the paper. Suppose the defendants were lawyers; the receipt of a bill for collection might authorize and require them to commence a suit upon it, to obtain a judgment and execution, and to commit the execution to an officer for service; but they would not be personally liable because the officer neglected to pay over the money. Suppose they were bankers, in Boston or Lowell; the receipt of a bill or note or draft for collection in a distant place would not oblige them to do more than to use the customary and proper agencies for collection, according to the common course of business; and they would not be responsible for the default of any substituted agent whom they were properly, by the nature of the business, authorized to employ. *Dorchester & Milton Bank* v. *New England Bank*, 1 Cush. 177. *Warren Bank* v. *Suffolk Bank*, 10 Cush. 582

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But if the bill was to be collected by a collector in the place where he resided or transacted business, a very different rule would apply.

We are of opinion that the ruling of the court at the trial was substantially right. If the defendants were expressmen doing business only between Lowell and Boston, and not undertaking personally for the carriage of goods to any farther points, but merely engaging to forward them to their destination through the established lines of transportation beyond, then, in the absence of any special contract creating a different obligation, the receipt of the bill of the goods which they had received to forward "for collection," would only require that they should send the bill with the goods through the ordinary channels of communication; and the substituted agents of transmission, if selected with due care, and according to the usual course of business, would not be their agents, but the agents of the owners of the property, and they would not be responsible for their defaults or misconduct.

The case of *Wareham Bank* v. *Burt*, 5 Allen, 113, does not conflict with this doctrine. That case was decided upon the ground of a special agreement in writing, creating a specific obligation of a very peculiar character. *Exceptions overruled.*

TERESA DAMON & another *vs.* ANN DAMON.

A testator commenced his will as follows: "I, A. B., being about to go to Cuba, and knowing the danger of voyages, do make this as my last will and testament, in manner and form following: First, if by casualty or otherwise I should lose my life during this voyage, I give and bequeath to my wife," &c.; and afterwards gave independent bequests, and spoke of the instrument as his last will and testament. He made the voyage and returned in safety, and afterwards died. *Held*, that the will should be admitted to probate.

APPEAL from a decree of the judge of probate, allowing the probate of an instrument dated August 3, 1860, the material portions of which are as follows:

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"In the name of God, Amen. I, J. W. Damon, of Charlestown, in the County of Middlesex, Commonwealth of Massachusetts, being in sound mind and body, and being about to go to Cuba, and knowing the dangers of voyages, do hereby make this as my last will and testament, in manner and form following:

"First, If by casualty or otherwise I should lose my life during this voyage, I give and bequeath to my wife Ann the use and behoof of the house now building in this Charlestown, situated on the corner of High Street and Monument Avenue, during her natural life, and then to descend to our children Teracita and Lottie, together with the house on the corner of Main and Green Streets, with any other house or houses I may be possessed of on Monument Avenue: also one half of the wharf situate in Charlestown, called 'Damon's Wharf,' and all the property I may hold on the Island of Cuba at the time of my decease. And I hereby give to my nephew John Martin Damon the other half of the said 'Damon's Wharf,' to hold and to have for his use."

[The second and third clauses contained devises to his nephews and brothers, and appointed his wife executrix.]

"Signed and deposited among my papers, making my wife Ann accountant, with those she may choose to settle all affairs in Cuba and all other places where I may have business at the time of my decease, of this my last will and testament."

It was agreed that J. W. Damon died in Charlestown, where he then resided, on the 26th of March 1863, leaving a widow, the appellee, and two minor children, Teresa and Charlotte, the appellants. The above will was a holograph, executed in Charlestown. In the fall of 1860 the testator went to Cuba and returned safely in 1861. He had for many years carried on business in Cuba, where he had a large property.

The case was reserved by *Hoar*, J. for the determination of the whole court.

D. Thaxter, for the appellants, cited *Parsons* v. *Lanoe*, 1 Ves. Sen. 189; *Ex parte Lindsay*, 2 Bradf. (N. Y.) 204; *Todd's Will*, 2 Watts. & S. 145; *Wagner* v. *M'Donald*, 2 Har. & Johns. 346

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Tarver v. *Tarver*, 9 Pet. 174; *Sinclair* v. *Hone*, 6 Ves. 607; *In re Ward*, 4 Hagg. Eccl. 179; *Burton* v. *Collingwood*, Ib. 176; *Strauss* v. *Schmidt*, 3 Phillimore, 209; *Bateman* v. *Pennington*, 3 Moore P. C. 223.

S. Bartlett, for the appellee, cited, in addition to some of the above cases, 1 Williams on Executors, (4th Amer. ed.) 163; Swinburne, 986.

Hoar, J. There seems to be no reason upon principle why an instrument cannot be made which is to take effect as a will only on the happening of a contingency named in it. As every devise or legacy, and the appointment of an executor, may be made conditional, if the same condition applies to all, it may be as well annexed to the entire instrument as to a single provision; and the happening of the condition can then be ascertained when the will is offered for probate. And so it has been held in various cases which have been cited at the bar.

But there are two points to be settled before a will can be rejected from probate on the ground that it is a conditional will, and that the condition has failed; first, whether the intention of the testator is to make the validity of the will dependent upon the condition, or merely to state the circumstances and inducements which lead him to make a testamentary provision; and secondly, if the language clearly imports a condition, whether it applies to and affects the whole will, or only some parts of it.

We are unable to see that, on any sound principle of construction, the language used in this will can be taken to express merely the cause and inducement of making it. The introductory clause is complete in itself, in a form quite common, and states distinctly the motive of the testator in making the will. "I, J. W. Damon, of . . . . . being in sound mind and body, and being about to go to Cuba, and knowing the dangers of voyages, do hereby make this as my last will and testament, in manner and form following." So far, what is said applies to the whole instrument. Then come the particular dispositions: "First, If by casualty or otherwise I should lose my life during this voyage, I give and bequeath to my wife Ann," &c. The

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condition is thus grammatically, and according to the common use of phraseology, attached to and qualifies the particular bequest. He gives a certain piece of property to his wife, if he loses his life during the voyage. There is no gift to her without that qualification. Suppose any other condition had been expressed — "If I die before I reach a certain age," or "before a certain house is finished;" or "if the legatee survives A.;" could it be doubted that it would make the bequest conditional? The word "first," preceding the condition and the gift, has a tendency to show that the testator is expressing a particular qualification and not a general purpose. To change the word "if" into "lest" would be to make a change in the meaning on grounds purely conjectural.

The other reasons urged for the opinion that the whole will was made "lest the testator should die during the voyage," namely, the appointment of his wife as accountant to settle his affairs in Cuba "and all other places where I may have business at the time of my decease," he having no business elsewhere than in Cuba and Charlestown when the will was made, and the repetition of the phrase "this my last will and testament," whatever weight might be given to them if the sole question were whether the whole will must fail if he accomplished the voyage in safety, are deprived of all force if the condition affects but a single clause.

And upon the second question proposed, we are of opinion that the condition does not affect any other than the first clause of the will, and that the will is therefore entitled to probate, having been duly executed.

The case most nearly analogous, to be found among the adjudged cases, is that of *Parsons* v. *Lanoe*, cited from 1 Ves. Sen. 189, but also to be found in Ambl. 557. Each of these reports is apparently imperfect and fragmentary; but, by taking both, a pretty correct idea of the case can be obtained. The report in Ambler is the best, so far as it gives the will itself more at length; and some of the expressions attributed to Lord Hardwicke in Vesey, to which it is hard to give a sensible meaning, are not found in it. As there recited, the will began thus:

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"I, Charles De Lanoe, of . . . . . do make and appoint this to be my last will and testament, in manner following: i. e. *Imprimis*, In case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland, my will and desire is, that my house and lands at Farley Hill . . . . . be all sold," &c. Each subsequent clause containing a bequest referred expressly to this sale, and provided for a payment out of it; the final bequest being of the residue of the money arising from the sale, with all the remainder of his estate, real and personal, to his wife, whom he appointed executrix. The suit was a bill in equity for the payment of one of the legacies, and to procure a sale of the real estate for that purpose. The testator was childless when the will was made, and returned from Ireland, and had children born to him afterward. According to the report in Ambler, Lord Hardwicke decided that the condition was not so inserted as in express terms to make the whole will conditional; but that beyond all controversy it made the devise as to the sale conditional; and that all the subsequent dispositions were made to depend upon the sale, and so were connected with the condition. He did not advert to the appointment of an executrix; and all that was essential to the decision was, that the legacy to the plaintiff was upon a condition which had failed. He proceeded to discuss the effect of the birth of the children as a revocation of the will, but gave no opinion upon it, though intimating some views of his own respecting it. And it is manifest from the context that the remark which Vesey attributes to him, that his conclusion on the second question "greatly strengthens the construction upon the first," was misunderstood by the reporter; and that he could have only referred to the satisfaction which the court felt in coming to the decision which was made upon the construction of the will, in view of the result which a different decision would have caused, by disinheriting the children. Lord Hardwicke further held that no collateral proof of declarations of the testator respecting the will, not amounting to a republication, were admissible to control the effect of the condition.

In the case at bar, the condition stands very much as in

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Parsons v. *Lanoe*. But the second and third clauses in the will are entirely independent of the first, and do not refer to it in any manner. They contain distinct legacies to collateral relatives. The will does not purport to make any disposition of personal property, unless the property referred to "on the Island of Cuba" may be construed as including some.

The cases cited at the argument, with the exception of *Parsons* v. *Lanoe*, afford but little aid in coming to the decision at which we have arrived, and are chiefly valuable as showing that courts do not incline to regard a will as conditional where it can be reasonably held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be, if strictly construed. But no authority has been found which would justify us in rejecting this will as wholly conditional.

We intend to express no opinion upon the point, how far the condition qualifies the devises in the first clause. It is very difficult to give all of the provisions a sensible interpretation, and one of the parties largely interested has not been a party to the hearing. We only decide that the will is to be admitted to probate. *Decree affirmed.*

WILLIAM BROWN *vs.* WILLIAM O. BENJAMIN.

If the plaintiff in an action of tort in the nature of trespass *quare clausum* has testified that he was in the occupation of the premises, without being inquired of or testifying as to any title thereto, proof of a recent deed to his wife, to her sole and separate use, is not sufficient of itself to authorize the court to instruct the jury that the plaintiff had not such a title as to enable him to maintain his action.

TORT in the nature of trespass *quare clausum*.

At the trial in the superior court, before *Ames*, J., it appeared that the premises in question were a mill and mill privilege, and the acts complained of were alleged to have been committed between April 24th 1861 and May 14th 1862. It appeared that

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the defendant had formerly owned the premises; and the plaintiff testified that between the above dates he was in the actual occupation thereof, though he made no attempt to show any other title than actual possession. The defendant was permitted to prove, against the plaintiff's objection, that on the 17th of May 1861 he executed a deed of the mill and mill privilege to the plaintiff's wife, to her sole and separate use; and the judge ruled that even if the plaintiff occupied and carried on the mill, yet, as it was the sole and separate property of his wife, his occupation must be considered as her occupation, and his possession was only as her bailiff, servant or agent; and that he had not such a title in the property conveyed to her as to entitle him to maintain an action for any alleged trespass thereon.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

G. M. Brooks, for the plaintiff.

J. Q. A. Griffin, for the defendant.

METCALF, J. It is the opinion of the court that it was prematurely ruled, at the trial, that the plaintiff "had not such a title in the property conveyed to his wife as to entitle him to maintain an action for any alleged trespass thereon." This ruling was made on the single ground that the occupation, by the husband, of real estate conveyed to his wife for her sole and separate use, must be considered as her occupation, and that his possession is possession as her bailiff, servant or agent. But, assuming that his possession merely as her bailiff, servant or agent, would not entitle him to maintain this action, yet it is our opinion that it was not a necessary legal inference from the only evidence on which the ruling was made, that he was in possession merely as her bailiff, &c. The plaintiff had testified that he was in the occupation of the *locus in quo* at the time of the alleged trespass upon it, and did not attempt to show any title thereto, besides that of actual possession. But the defendant did not cross-examine the plaintiff concerning the nature of his possession, nor was any evidence given of its nature, besides the conveyance to the wife's sole and separate use; and there are ways in which he may have had rightful possession in his

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sole personal right. He may have been assignee of his wife's lessee; or he may have received possession directly from her. As to a wife's separate property, she is regarded, in England, as a feme sole, and may transfer to her husband the same interest in it, if done freely, that she can to any other person. The possession, rents and profits of her separate real estate, she may undoubtedly give to him. 1 White & Tudor's Lead. Cas. in Eq. (3d Amer. ed.) 509. Jeremy on Eq. 208. Clancy on Husb. & Wife, 347 *& seq.* Bell on Husb. & Wife, 498. Reeve's Dom. Rel. (1st ed.) 165.

As no inquiry was made of the plaintiff, as there might have been, respecting the nature of his possession, and as there was no evidence that the defendant was not a mere stranger and wrongdoer, we cannot sustain the ruling that the evidence showed that the plaintiff could not maintain this action. For it is settled law, that actual possession of real estate is sufficient to enable the party in possession to maintain trespass *quare clausum fregit* against a stranger, and every one must be deemed a stranger, who cannot show any title or elder possession. By Shaw, C. J. 14 Pick. 301.

On a new trial, which is to be granted, it may be shown whether the plaintiff's possession was such as entitled him to maintain this action, and, if it was, whether the defendant can maintain a defence on the merits of the case.

Exceptions sustained.

WILLIAM C. PERVEAR *vs.* CHARLES KIMBALL.

No action lies against a sheriff upon a judgment recovered against his deputy.

CONTRACT against the sheriff of Middlesex upon a judgment recovered against one of his deputies for the wrongful taking of the plaintiff's goods. It appeared that no property of the deputy could be found to satisfy the execution which issued

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upon the judgment, and that the defendant refused to pay the same. Judgment was rendered in the superior court for the plaintiff, and the defendant appealed to this court.

J. Q. A. Griffin, for the defendant.

A. V. Lynde, for the plaintiff.

CHAPMAN, J. If the sheriff is to be regarded as a joint tres passer with his deputy, as he is said to be in *Morgan* v. *Chester*, 4 Conn. 387, still it was never heard that when a party recovered judgment against one joint trespasser, he could maintain an action on that judgment against another joint trespasser. But the case of *Campbell* v. *Phelps*, 1 Pick. 62, does not regard them as joint trespassers; for it decides that the party injured by the act of the deputy cannot sue them jointly, but must elect which of them to sue. This view seems to regard them as master and servant. *Parsons* v. *Winchell*, 5 Cush. 592. But if this be the correct view of their relation to each other, still it was never heard that a party, having recovered a judgment against a servant for a tort, could maintain an action upon that judgment against the master.

To maintain an action like the present, it would be necessary to regard the sheriff and his deputy as identical, so that a judgment against the deputy should be regarded as a judgment against the sheriff. It is hardly necessary to say that this would be confounding all legal distinctions.

The authorities cited in behalf of the plaintiff to show that a sheriff is liable for the default of his deputy are not in point, for they have no tendency to show that he may be sued on a judgment recovered against the deputy.

Judgment for the defendant.

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The President, Directors and Company of the Appleton Bank *vs.* William Fiske & others.

If a person who obtains discounts at a bank voluntarily allows a sum to remain on deposit with the expectation that this course will enable him to obtain discounts more readily, but without any agreement or understanding that he may not draw his money at any time, there is no usury in the practice.

Contract upon a promissory note signed by the defendants as maker and indorsers. The defence was that the note was given on a usurious consideration, and also that it was in violation of Gen. Sts. *c.* 57, § 68.* At the trial in the superior court, the defendant Fiske was the only witness, and, upon undisputed facts, which are stated in the opinion, *Rockwell*, J. ruled that the plaintiffs were entitled to recover; and a verdict was returned accordingly. The defendants alleged exceptions.

I. S. Morse & G. Stevens, for the defendants, cited *Foster* v. *Essex Bank*, 17 Mass. 479; *Jones* v. *Whitney*, 11 Mass. 74; *Bridge* v. *Hubbard*, 15 Mass. 96; *Western Bank* v. *Mills*, 7 Cush. 539; *Mills* v. *Western Bank*, 10 Cush. 22; *Knapp* v *Briggs*, 2 Allen, 551; *Sylvester* v. *Swan*, 5 Allen, 134.

T. H. Sweetser, for the plaintiffs.

Hoar, J. To constitute usury, there must be an agreement by which a greater rate of interest than the law allows is reserved or taken; and this agreement must be so far completed as to become obligatory upon the parties to it. The evidence showed that the defendant Fiske was told by the plaintiffs' cashier that he could have notes discounted by paying about eight per cent. interest, and could have the loan continued at the same rate. The defendants subsequently made an arrangement with the directors to have their notes discounted, and obtained

* This statute is as follows: "No bank shall directly or indirectly make a loan or discount, unless the amount of the loan or the proceeds of the discount are payable by the bank on demand in specie or in the bills of the bank; and every loan or discount made contrary to the provisions of this section shall be void; and the bank for each offence shall forfeit five hundred dollars."

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a discount of a new note sufficient to meet each note as it became due; and so long before it was due that, leaving the money on deposit, the discount on the time for which they had the use of the money would amount to eight per cent. If this had been all the evidence, it might have been a question for the jury whether the discount of the notes was not made upon an agreement that the money should be retained by the plaintiffs on deposit, and thus that the apparent furnishing the money for the renewal of notes before they became due was merely a cover for usury. But the evidence came from a single witness, who was one of the defendants, and he testified positively and expressly that he "always understood that all the money to his credit was subject to his draft, at any moment, and nothing was ever said to the contrary with any member of the bank." This testimony excludes the idea of any contract for the retaining of the money by the bank, either express or implied, for the purpose of receiving unlawful interest.

If a person who obtains discounts at a bank voluntarily allows a considerable sum to remain on deposit, with the idea and expectation that this course on his part will enable him to obtain discounts more readily, but without any agreement or understanding that he may not draw his money at any time, there is no usury in the practice.

There being no evidence to sustain either branch of the defence relied upon, the ruling at the trial was right.

Exceptions overruled.

SAMUEL FARSON *vs.* AMOS GOODALE.

A tenant at will who quits and delivers up a demised tenement by the express oral consent of his landlord is not thereafter liable for rent, although he does not give a written notice under the statute, or return the whole number of keys belonging to the tenement.

CONTRACT to recover a month's rent of a tenement which had been occupied by the defendant as tenant at will to the plaintiff.

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At the trial in the superior court, before *Morton*, J., there was evidence tending to prove that before the commencement of the month in question the defendant left the premises by the express consent of the plaintiff, who said that he should not require a written notice; and the judge instructed the jury that if this fact was established the defendant was entitled to a verdict. It also appeared that, after the defendant had left the tenement, he sent to the plaintiff a portion only of the keys belonging to it, which the plaintiff declined to receive. It was in controversy whether this was before or after the commencement of the month, and the judge ruled that it was immaterial. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

A. F. L. Norris, for the plaintiff.

A. R. Brown, for the defendant.

Merrick, J. A tenancy at will may be terminated at any time and in any manner which may be mutually agreed upon by the parties. A landlord may waive the notice to which he is entitled under the provisions of the statute for this purpose, and consent that his tenant may quit and deliver up the premises at his pleasure. If the tenant avails himself of this consent, and relinquishes the possession and all right of possession of the estate, and gives notice thereof to the landlord, he will thereby terminate the lease and be liable for no further rent. *Tuttle* v. *Bean*, 13 Met. 275. *Whitney* v. *Gordon*, 1 Cush. 366.

The instructions of the court were in conformity to this rule, and were correct. The tender by the tenant of less than the whole number of keys belonging to the tenement is immaterial. It is sufficient that he quit the estate and surrendered it to the landlord, in conformity to the permission given to him to terminate the tenancy in that manner. *Exceptions overruled.*

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BENJAMIN A. PATTEN & another *vs.* JANE ADAMS.

If a writ of entry is brought by two demandants, and they prove a good title in themselves jointly at a period prior to the date of the writ, the tenant, under a plea of *nul disseisin*, may show that subsequently, and before the date of the writ, one of them conveyed his title to the other.

WRIT OF ENTRY, brought May 27th 1862, to recover possession of a parcel of land in Waltham. The plea was *nul disseisin*.

At the trial in the superior court, before *Lord*, J., the demandants proved a good title to themselves jointly under a deed to them from George Miller, dated February 14, 1854. The tenant then offered in evidence a deed dated November 19, 1858, from the demandant Patten to the other demandant, Theodore A. Barry. To this the demandants objected on the ground that it was inadmissible under the pleadings, and that if the demandants were then disseised the deed was void. The judge admitted the evidence, and suggested that the burden of proof was on the demandants to prove that the disseisin took place prior to the date of the deed. The demandants then called the tenant's son as a witness, who testified to facts, referred to in the opinion, tending to prove a disseisin by his father, Lowell Adams, from 1840 to 1851, and, after his father's death, a disseisin by the tenant as early as 1854; and the judge then, with the consent of the counsel, submitted it to the jury to find whether Lowell Adams, in his lifetime, took the absolute and exclusive control of the premises, claiming title thereto, and, if not, at what time the tenant took the absolute control of the premises under claim of title; and they replied in the negative to the first interrogatory, and found that the disseisin by the tenant was after the 19th of November 1858. The judge thereupon ordered a general verdict for the tenant, which was accordingly rendered; and the demandants alleged exceptions.

W. Brigham, for the demandants, cited Stearns on Real Actions, 226, 232, 470; *Shapleigh* v. *Pilsbury*, 1 Greenl. 271; *Howard* v. *Chadbourne*, 5 Greenl. 15; *Wolcot* v. *Knight*, 6 Mass. 418.

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T. H. Sweetser & G. A. Somerby, for the tenant, cited *Cutler* v. *Lincoln*, 3 Cush. 125; *Hall* v. *Stevens*, 9 Met. 418; *King* v. *Barns*, 13 Pick. 24; *Knox* v. *Kellock*, 14 Mass. 199; *Wolcot* v. *Knight*, 6 Mass. 418.

CHAPMAN, J. The plea of *nul disseisin* to a writ of entry admits the possession of the tenant at the date of the writ, but does not relate to any prior period. The demandant must then prove that he has a better title than the tenant, or he cannot recover. In this case the demandants proved a good title in themselves by the deed of George Miller to them, dated February 14, 1854. The tenant then offered in evidence a deed from the demandant Patten to the demandant Barry of one undivided half of the premises, being all the right which he took under the deed from Miller. The obvious purpose of this evidence was to show that the action could not be maintained by both the demandants, because Patten had at the commencement of the action no interest in the premises; but that the sole interest was in Barry. This evidence was objected to as incompetent under the pleadings, on the ground that the plea admitted that the demandants were disseised at the time of making the deed. But the writ was dated May 27, 1862, and the deed was made November 19, 1858. The plea therefore did not relate to the time of making the deed, but to a period several years later. The demandants might avoid its effect by showing that when it was made the grantor was disseised, and so nothing passed by it. But the suggestion of the judge, that the burden of proving this fact was on the demandants, was correct. The tenant had not alleged such disseisin, and was not estopped to deny it. The demandants then offered evidence on this point, being the testimony of the tenant's son. If his statement imports that ever since 1854 his mother had paid the taxes, made repairs and claimed the estate as her own, it tends to prove the point in question.

The finding of the jury on the first question submitted to them indicates that the testimony of the tenant's son was not believed by them. And it is difficult to account for their finding on the second question on any other ground. Setting aside his

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testimony, the only evidence of disseisin seems to be the admission of the plea, which relates to the date of the writ. We see no evidence that indicates a disseisin in any part of the year 1858. But if the verdict was against the evidence, or the weight of the evidence in any material particular, the remedy of the party is by motion for a new trial. Whether the demandant may amend by striking out the name of Patten cannot be considered here. We can only pass upon the rulings of the judge so far as they are excepted to; and they do not appear to be erroneous

Exceptions overruled.

THOMAS EASTMAN *vs.* NATHAN CROSBY.

A payment of corporate debts by a stockholder in a foreign corporation will be deemed to have been voluntary, in the absence of proof that he was legally liable therefor.

CONTRACT. The declaration set forth that in February 1853 the plaintiff, the defendant, J. C. Dodge and Alanson Tucker, Jr. were the owners of the shares of the Belknap Manufacturing Company, a corporation established in New Hampshire; that they then agreed in writing that the plaintiff and the defendant should take the mill property "and pay the debts;" that afterwards, in September of that year, the defendant purchased of the plaintiff all of the shares, and agreed in writing with the plaintiff "to hold him harmless from the payment of any and all debts and liabilities of said company;" that the corporation was indebted to one Melcher, who commenced an action and recovered judgment against them, and levied his execution upon property of Tucker; that, to avoid a suit by Tucker, the plaintiff has paid to him the amount for which his property was taken; and that the defendant has refused to reimburse him therefor, though requested.

At the trial in the superior court, before *Morton*, J., the plaintiff introduced in evidence the above agreements, and proved the recovery of the judgment by Melcher and the levy of his execution, together with the payment to Tucker by himself, as

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alleged, and rested; and thereupon the judge ruled that the payment by the plaintiff was in law voluntary, and that he could not recover in this action. The jury accordingly returned a verdict for the defendant, and the plaintiff alleged exceptions.

R. B. Caverly, for the plaintiff.

T. H. Sweetser, for the defendant.

HOAR, J. There are not facts enough reported in this bill of exceptions to show that, by the laws of New Hampshire, Tucker and Dodge were liable to pay this debt, or that Eastman was liable to pay it to them. Such may have been the fact; but it is for the party excepting to cause such facts to appear in evidence, and to be reported in the bill of exceptions, as will show that the ruling at the trial was wrong, if he expects to avail himself of them No judgment was recovered against Tucker, and the evidence does not show that he was liable for the debt of the Belknap Company, or that the execution against the company could be lawfully levied upon his land. This court do not take official cognizance of the laws of other states, and they are to be proved as facts by parties who rely upon them.

It not appearing that Tucker was bound to pay the debt to Melcher, or liable for it in any manner, there is nothing to show that he had any lawful claim against Eastman, or that Eastman's payment to him was not voluntary.

Exceptions overruled.

DANIEL MCKINNEY *vs* GEORGE A. WHITING.

No action lies to charge a person upon or by reason of false oral assurances concerning the credit and ability of a corporation of which he was the treasurer, made in order to induce the plaintiff to receive a note of the corporation, signed by him as treasurer.

TORT. The declaration alleged, in two counts, that the defendant was the treasurer and managing director of the Malden and Melrose Railroad Company, and that, in order to induce the plaintiff to accept certain notes of the company, signed by

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the defendant as treasurer, in payment for horses sold by the plaintiff to the company, the defendant represented to the plaintiff that the company was perfectly good, and did not owe anything, but was short of funds for ready use on account of the snow; whereas the company was in fact utterly insolvent, as the defendant knew; and the plaintiff accepted the notes accordingly. It was agreed that none of these representations were made in writing; and the case was reserved by *Metcalf*, J. for the determination of the whole court, to be tried if, upon parol proof of the representations charged, the action could be maintained.

J. Q. A. Griffin, for the plaintiff.

H. C. Hutchins, for the defendant.

Bigelow, C. J. The declaration sets out a case wherein the gist of the action is, that a false representation was made by the defendant concerning the pecuniary ability of a corporation, for the purpose of inducing the plaintiff to give credit to such corporation by taking their notes in part payment for property sold by the plaintiff to them through their authorized agent. The allegation is not that the plaintiff was led to give credit to the defendant by reason of such false representations, but to the corporation. As the word "person" extends to and is to be applied in the construction of statutes to bodies politic and corporate, according to the provision contained in Gen. Sts. *c.* 3, § 7, *cl.* 13, it is clear that this action comes within Gen. Sts. *c.* 105, § 4, and cannot be maintained, unless the false representations are in writing. The action might have been maintained on parol proof of such representations, if they had been made by the defendant concerning the credit and ability of the corporation, with the intent and design to induce the plaintiff to sell goods to the defendant on credit. It would then have come within the cases of *Medbury* v. *Watson*, 6 Met. 246, and *Norton* v. *Huxley*, 13 Gray, 285. But as the allegations in the declaration show that the false representations were made concerning the credit of the corporation with an intent to induce the plaintiff to part with his property to the corporation, and take their notes in payment, the case is clearly within the prohibition of

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the statute, according to its well settled construction. *Kimball* v. *Comstock*, 14 Gray, 508. *Wells* v. *Prince*, 15 Gray, *Mann* v. *Blanchard*, 2 Allen, 386.

Judgment for the defendant.

SIMEON W. BROWN *vs.* ELLIS KENDALL.

If a debtor who is arrested on execution and taken before a magistrate enters into a void recognizance, and does not obtain his release according to law, the judgment is not thereby discharged; and the assent of the creditor to the proceeding is not to be inferred from the fact that the magistrate is his attorney.

CONTRACT on a judgment recovered by the plaintiff against the defendant.

It was agreed that an execution issued upon the judgment, upon which the defendant was arrested on the 21st of June 1860 and taken before Josiah Rutter, a commissioner of insolvency, and released from custody upon entering into a recognizance with surety for his appearance within ninety days, according to *St.* 1857, *c.* 141; that he never delivered himself up for examination; and that Rutter was the attorney of the plaintiff in the prosecution of the suit and the collection of the execution.

Upon these facts judgment was rendered in the superior court for the defendant; and the plaintiff appealed to this court.

J. Rutter, for the plaintiff, cited *Clapp* v. *Hayward*, 15 Mass. 276; *Little* v. *Hasey*, 12 Mass. 319; *Clap* v. *Cofran*, 7 Mass. 98; *Hidden* v. *Saunders*, 2 R. I. 391; *Jackson* v. *Bartlett*, 8 Johns. 361; *Kellogg* v. *Gilbert*, 10 Johns. 220.

S. H. Folsom, for the defendant, cited *Coburn* v. *Palmer*, 10 Cush. 273; *Cable* v. *Cooper*, 15 Johns. 152; *Cantillon* v. *Graves*, 8 Johns. 472.

CHAPMAN, J. The defendant was arrested on an execution which had issued upon the judgment declared on in this case,

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and was taken before a magistrate, before whom he entered into a recognizance in conformity with the provisions of St. 1857, c. 141. But the recognizance was taken on the 21st of June 1861, which was after the General Statutes were in force. The recognizance limited the time of the defendant's appearance to ninety days. But the time had been changed by Gen. Sts. c. 124, § 10, to thirty days; and the recognizance, not being conformable to the existing law, was void. The defendant did not comply with the condition of his recognizance, and now insists that the judgment itself is discharged.

If a recognizance had been taken according to law, the plaintiff's only remedy would have been by an action upon it. *Coburn* v. *Palmer*, 10 Cush. 273. So if the plaintiff had consented to the proceeding, the judgment would have been discharged. But he cannot be regarded as consenting to it. It is true that the magistrate by whom the recognizance was taken had been his attorney in the prosecution of the suit, and was still his attorney for enforcing the execution; but in taking the recognizance he acted as a magistrate, professing to have the authority of law, independent of the consent of the plaintiff. Whether it would have been beyond his power, as the attorney of the plaintiff, to consent to the discharge of the defendant upon his giving a void recognizance, need not be decided. The case of *Kellogg* v. *Gilbert*, 10 Johns. 220, seems to show that he had not such power. But it is sufficient in the present case that the form of the recognizance was settled by him as a magistrate, and not as the attorney of the plaintiff. As between the plaintiff and the defendant, there was an escape of the defendant, and the judgment is not discharged in consequence of the arrest.

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CAROLINE M. FARWELL *vs.* DOLLY B. COTTING.

A woman who, to release dower, has joined with her husband in a mortgage of land, cannot upon his death maintain a writ of dower against the mortgagee or his assignee in possession.

WRIT OF DOWER. At the trial in this court, before *Hoar*, J., a verdict was returned for the tenant under the direction of the court, upon admitted facts, which are sufficiently stated in the opinion. The demandant alleged exceptions.

W. P. Harding, for the demandant.

G. A. Somerby, for the tenant.

MERRICK, J. It is very clear that, upon the facts stated in the bill of exceptions, this action cannot be maintained. The demandant joined with her husband Richard Farwell in two mortgage deeds made by him severally to George and Ephraim Howe in 1825 and 1833, for the purpose of releasing her right of dower in the estate described in the writ, which was thereby conveyed. The note mentioned in the mortgage to George Howe not having been paid when it became due, both the note and mortgage were duly assigned and transferred to Ephraim Howe, the second mortgagee. Farwell's right in equity of redemption was afterwards, in May 1835, seized upon an execution against him, and was duly sold thereon at a sheriff's sale to S. S. Morey. The equity of redemption so sold has never been redeemed by said Farwell, nor by any person claiming under him; but more than one year after the sale, and after the death of said Morey, which occurred in the year 1837, it was conveyed by the administrator of his estate to Ephraim Howe, then the owner and holder of both of said mortgages. On the 3d of May 1840 Ephraim Howe, by his deed of that date, conveyed the whole estate to one Cotting, the father of the tenant, to whom upon his decease it descended as his heir at law. Since that time said Farwell has not been in possession of the estate, but Cotting and his heirs have had the control and uninterrupted possession of it.

A widow is certainly dowable in an equity of redemption. But after having joined with her husband in a mortgage,

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relinquishing her right of dower, she cannot maintain an action at law to recover it against the mortgagee or his assignee in possession. But if the mortgage is not foreclosed, a court of equity will afford her relief by allowing her to redeem. But if the mortgage is foreclosed, all right of dower is thereby barred. *Gibson* v. *Crehore*, 5 Pick. 146. *Eaton* v. *Simonds*, 14 Pick. 98. *Brown* v. *Lapham*, 3 Cush. 551. 1 Washburn on Real Prop. 186, 203.

It is therefore manifest that the demandant cannot maintain her present action, which is an action at law to recover her dower, because the tenant is in possession as assignee of the mortgages, which she executed with her husband for the purpose of releasing it. The mere return of the notes to Farwell by Ephraim Howe more than one year after his conveyance of the estate, and after he ceased to have any interest in it, could not affect in any way the rights or the title of his grantee. Though the notes were returned to him after Cotting became the owner of the estate, Farwell does not appear to have ever pretended that they had been paid by him.

Exceptions overruled.

JOHN L. BOND *vs.* MARK FAY.

If a deed of land, in describing the granted premises, after naming a certain monument, adds, "thence running southerly by land improved by A. to the road," and a straight line to the road, running a little east of south, will include the land improved by A. in the granted premises, while a line running a little south of west, to the corner of the land improved by A., and thence along the line of said land a little east of south to the road, at a point nearly south of the monument, will exclude said land from the granted premises, the latter construction is to be adopted as the true one.

WRIT OF ENTRY to recover a parcel of land in Marlborough.

At the trial in the superior court, before *Ames*, J., without a jury, the demandant claimed title under a deed to him from the tenant, in which the description of the granted premises was as follows: Beginning "on the north side of the county road, at land of William Stratton; thence by said Stratton's land to a

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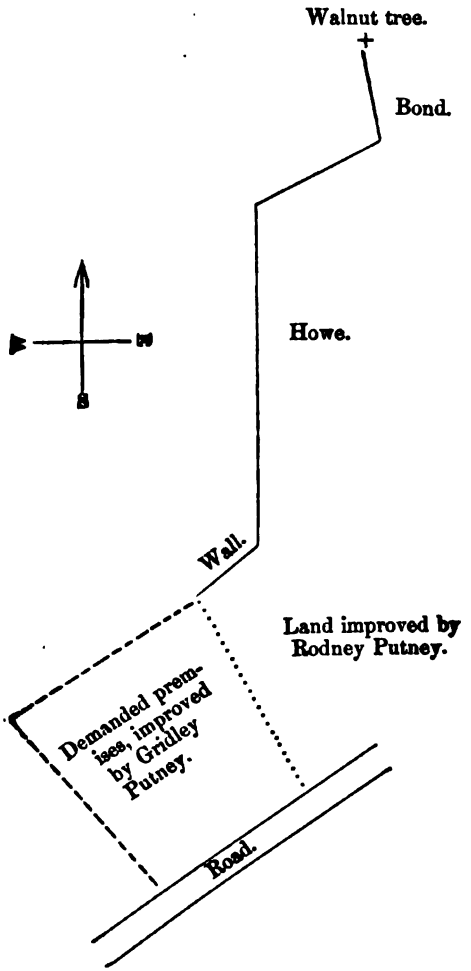
brook at land of William Felton; thence by said brook to the fence at land of Edward Rice; thence easterly by said Rice's to a walnut tree at land of Sarah Bond; thence southerly by said Bond's land to land of Moses Howe, Jr.; thence westerly by said Howe's land, and land improved by Rodney and Gridley Putney, to the corner of the wall; thence southerly by land improved by Gridley Putney to said road; thence westerly by said road to the bounds first mentioned." The following plan exhibits the material portion of the boundaries.



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The question at issue between the parties was, whether the line from the walnut tree should be so run as to include or exclude the demanded premises. It was agreed that a line following the solid line on the plan would come to the corner of a wall, standing at the date of the deed, which corner the demandant claimed to be the one named in the deed.

It appeared that at the date of the deed no land was improved by Rodney and Gridley Putney jointly, but that the land lying east of the demanded premises was occupied by Rodney alone, and that Gridley boarded with him and worked with him upon the same. The demanded premises were then owned by the tenant, and improved by Gridley Putney.

The tenant contended that the true line should run according to the heavily dotted lines upon the plan, and offered parol evidence to show that this was the intention of the parties; and the demandant contended that it should be according to the lightly dotted line. The judge ruled that the corner of the wall, as shown upon the plan, is to be considered as the monument called for by the deed, although not reached by a line running by land improved by Gridley Putney; and that the deed includes the demanded premises. He also excluded the offered evidence, and found for the demandant. The tenant alleged exceptions.

T. H. Sweetser & W. S. Gardner, for the tenant, cited, upon the construction of the deed, *Newhall* v. *Ireson*, 8 Cush. 598; *Frost* v. *Spaulding*, 19 Pick. 447; *Worthington* v. *Hylyer*, 4 Mass. 204; *Haynes* v. *Young*, 36 Maine, 557; *Loring* v. *Norton*, 8 Greenl. 68; 1 Greenl. Ev. § 301, *n.*; and on the question of evidence, *Bosworth* v. *Sturtevant*, 2 Cush. 392; *Stone* v. *Clark*, 1 Met. 378; 4 Cruise Dig. (Greenl. ed.) tit. xxxii. c. 21, § 31, *n.*

D. S. Richardson, for the demandant, cited, upon the construction of the deed, *Parks* v. *Loomis*, 6 Gray, 472; *Bosworth* v. *Sturtevant*, 2 Cush. 392; and on the question of evidence, *Dawes* v. *Prentice*, 16 Pick. 435; *Jenks* v. *Morgan*, 6 Gray, 448.

Hoar, J. The corner of the wall, which is a monument called for by the deed, having been found at the trial, and its position satisfactorily determined, the presiding judge was right

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in holding it decisive upon the question of boundary. There was no controversy as to the point where the line first reached the land of Moses Howe, Jr. From that point the deed gives it as running "westerly by said Howe's land, and land improved by Rodney and Gridley Putney, to the corner of the wall." There was no land "improved" by Rodney and Gridley Putney jointly; and the land by which the line must pass to reach the corner of the wall was "improved" by Rodney Putney alone, if the word "improved" is understood as meaning "occupied" or "held." But the monument being found, and there being no land answering the description in the deed by which the line could run to the monument, this part of the description must be rejected as erroneous, and the line treated as running to the monument by such land as is there found, though not precisely corresponding to the description.

But the facts reported tend very strongly to show why the land was described as being "improved" by Rodney and Gridley Putney. The word "improved" is not a technical word, having a precise legal meaning. Indeed, there is no very good authority for its use in the sense in which it is not unfrequently employed in familiar speech. It seems quite probable that, Gridley Putney living with his brother Rodney, and working with him upon the land, it was supposed that their possession of it was a joint possession; or that the conveyancer may have supposed that their connection with the land might be well enough expressed by the word "improved."

When we follow the line from the corner of the wall, the construction given to the deed at the trial does not appear to us to have been correct. The line is to run southerly by land improved by Gridley Putney to the road. The point of starting is fixed, and the road at which the line terminates is also ascertained. The line claimed by the demandant is a single line, and its direction is southerly, though inclining considerably to the east. So far it would correspond well enough with the line required, and it was adopted by the court. But the line should pass "by land improved by Gridley Putney." This land is found, and is a monument which cannot therefore be

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disregarded. The demandant's line includes this land within the tract conveyed. On the other hand, the line for which the tenant contends bounds upon this land, leaving it out of the piece conveyed. This corresponds with the common use of a boundary in a conveyance, and with the position of all the other lands referred to in the deed. It would be very unusual to say that a line bounded upon land described, when it would include it; and we cannot adopt such a construction, unless it becomes necessary to make the deed intelligible. The tenant's line terminates at the road very nearly south of the corner of the wall. To reach its terminus it goes first southwest, and then southeast, but the whole result is a southern course, and it follows the monument of the "land improved by Gridley Putney," excluding it from the conveyance. According to the ordinary rule, the monument must have a controlling effect, though it may induce some change in the course. Two other considerations favor the adoption of this line. First, in the earlier part of the description, the line from Moses Howe's land to the corner of the wall is in like manner spoken of as if it were a single line, and drawn westerly; while it is found to make two angles, beginning southwesterly, thence turning southerly, and thence again southwesterly. This would show that the conveyancer did not necessarily intend that a line which he described as passing in a general direction from one point to another should be a straight line. And secondly, the change in the description of the land which comes after passing the corner of the wall, from that which preceded it, shows that land in a different occupation was intended. For these reasons, we are of opinion that the line for which the tenant contended was the true line called for by the deed, and that there must be a new trial.

Exceptions sustained.

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Citizens' Mutual Fire Insurance Company *vs.* Daniel R. Sortwell & others.

A by-law of an insurance company, which provides that a special meeting shall be called by the president, or in his absence by the secretary, on application made to them in writing by ten members, does not preclude the directors from calling special meetings without such application.

One who becomes a member of a mutual insurance company after it has practically adopted the provisions of *St.* 1849, *c.* 104, § 2, authorizing the property insured to be divided into classes, and acted thereon for several years, cannot object, in an action to recover an assessment upon his deposit note, that the same were not formally adopted at a meeting regularly called for that purpose.

If the records of a corporation show that a meeting was duly called, a proper notice given, and that business was transacted at it, the presumption is that a quorum of members was present, unless the contrary clearly appears.

The directors of a mutual insurance company may divide the property insured by them into classes, under *St.* 1849, *c.* 104, § 2, from time to time, as the policies are issued; and after the full amount of one hundred thousand dollars is subscribed to be insured in each class, the policies will take effect, and one who becomes insured thereafter cannot object, in an action to recover an assessment upon his deposit note, that the proceedings were irregular.

Subscriptions for insurance in a particular class of risks of a mutual insurance company, which are made a short time before the adoption by the company of the provisions of *St.* 1849, *c.* 104, § 2, may, in an action to recover an assessment upon a deposit note of a subsequent member, after the lapse of ten years, without objection from the company or the persons insured, be taken as a part of the sum required by that statute to be subscribed, before the issuing of policies.

A statement in the instructions issued by the directors of a mutual insurance company to agents, that distilleries are not insurable, does not preclude the company from making a valid contract of insurance upon a distillery.

Contract brought by a mutual insurance company, to recover an assessment of fifty-five dollars upon a deposit note executed to them by the defendants, on a policy upon a distillery insured in the company's second class. The answer alleged that the property insured by the plaintiffs had never been legally divided into two classes, and that no second class had ever been legally established, and that the assessment was unequal and illegal, and denied that the defendants were legally insured in that class.

At the trial in the superior court, before *Lord*, J., without a jury, it appeared that the plaintiffs accepted their charter on the 1st of October 1846, and at the annual meeting on the 9th of January 1849, and at meetings of the directors held thereafter

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votes were passed looking to a division of the property to be insured by the company into two classes; and at a directors' meeting held on the 5th of June 1849 it was voted that the secretary be requested to call a meeting of the policy holders to be held on the 2d of July to consider the subject of accepting *St.* 1849, *c.* 104, concerning mutual fire insurance companies, and that said notice be given by publishing notice of the same, agreeably to the rules of the corporation. The meeting was accordingly called, notified and held, and the record thereof showed that there were twenty-three policies represented; and a committee was chosen to ascertain the necessity of accepting said legislative act, and the meeting was adjourned to the 7th of August. At the adjourned meeting the record showed that twenty-four policies were represented, and, the report of the committee having been made, it was voted to accept the statute. And at various meetings of the directors held thereafter, votes were passed recognizing a practical division of the property insured by the company into two classes.

The 19th article of the by-laws of the company provided that fifteen members being present at a meeting, either personally or by proxy, should constitute a quorum for doing business; and article 20th contained the following provision: "A special meeting shall be called by the president, or in his absence by the secretary, on application made to them in writing by ten members."

Stephen W. Trowbridge testified that he was secretary and treasurer of the company; that it appeared from the books of the company that on August 2d 1849 the sum of $453,000, or thereabouts, had been subscribed to be insured in the second class in said company, and that between that time and October 1, 1849, $100,000 additional was subscribed; that the directors began to issue policies in the second class after the vote of the annual meeting of the company in January 1849; and that the $453,000 consisted of policies issued as in the second class on or before August 2d 1849, which, with new subscriptions as they came in, constituted that class after the acceptance of *St.* of 1849, *c.* 104. It also appeared that, after January 1849, a set of

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books was opened for the second class; that the business of the two classes had ever since been kept distinct; that policies were issued on and after August 7th 1849, without interruption, in the two classes; that the annual returns required by law had been made for both classes since 1849, and that the annual report of the treasurer and auditing committee contained a separate account for each class.

The defendants' application was put in, and bore date June 20th 1860, in which they request insurance in said company, and upon said application a policy was issued and accepted by them, approved June 22d, by which the plaintiffs insure the defendants, in their second class, against loss or damage by fire in the sum of $2000 on the "stock in trade of a rum distillery, contained in wood and brick building" in Somerville. The act of incorporation and by-laws of the company are printed on the policy. The signature to the note was admitted.

A monthly committee of two directors was regularly chosen, who passed upon all applications for insurance, and approved the issuing of policies, and allotted applicants in the first or second class, and whose doings were reported at the monthly meeting of the directors and by them approved. The method of the assessment and computation was not gone into in this case.

Parol evidence was offered that from October 7th 1849 all the acts of the directors, both as to the taking of risks and their division into classes, payment of losses and of dividends, and laying of assessments, have been conducted strictly with reference to a classification of risks into two classes.

The judge ruled that, upon the evidence presented, the company had not proved a legal division of risks into two classes by the directors, and that the assessment was therefore illegal, because not laid upon all the members of the company, and ordered judgment to be entered for the defendants. The plaintiffs alleged exceptions.

B. R. Curtis & H. Baldwin, for the plaintiffs. 1. The special meeting was duly called. *Sargent* v. *Webster*, 13 Met. 497. *Commonwealth* v. *Woelper*, 3 S. & R. 29. *McDaniels* v. *Flower Brook Co.* 22 Verm. 274. *Clarke* v. *Imperial Gas Co.* 4 B. & Ad. 315.

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Great North of England Railway v. *Biddulph*, 7 M. & W. 243. 2. If not, it is not for the defendants to object. *Chester Glass Co.* v. *Dewey*, 16 Mass. 94. 3. The presumption is that a quorum was present. *Williams* v. *Cheney*, 3 Gray, 220. 4. No formal vote dividing the risks into classes was necessary. The action of the directors was sufficient. *Lexington & West Cambridge Railroad* v. *Chandler*, 13 Met. 311. *London Tobacco Pipe Co.* v. *Woodruff*, 7 B. & C. 842. *Great North of England Railway* v. *Biddulph*, 7 M. & W. 243. 5. The defendants cannot object to informalities happening so long ago, which do not appear to have produced any appreciable effect upon their rights. Redfield on Railways, (2d ed.) 86, and cases cited. *Chester Glass Co.* v. *Dewey*, 16 Mass. 94. *Long Pond Ins. Co.* v. *Houghton*, 6 Gray, 77. *New England Ins. Co.* v. *Belknap*, 9 Cush. 140. 6. The policies issued by the company were valid, whether the required sum had been subscribed or not. *Magdalena Steam Nav. Co.* 6 Jur. (N. S.) 975. *County Commissioners* v. *Aspinwall*, 21 How. (U. S.) 545. *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327. 7. Certainly the defendants cannot make the objection. *Deposit Life Ins. Co.* v. *Ayscough*, 6 El. & Bl. 761. *Hull Flax Co.* v. *Wellesley*, 6 Hurlst. & Norm. 38. *Wolverhampton New Water Works Co.* v. *Hawksford*, 7 C. B. (N. S.) 795. 8. The prohibition to the agents to take distilleries does not affect this risk taken by the company.

J. S. Holmes & C. S. Lincoln, for the defendants. 1. The special meeting was not duly called. *Brewer* v. *Chelsea Ins. Co.* 14 Gray, 203. *Hale* v. *Mechanics' Ins. Co.* 6 Gray, 169. *Atlantic Ins. Co.* v. *Fitzpatrick*, 2 Gray, 279. *Wiggin* v. *Baptist Church in Lowell*, 8 Met. 301. 2. It does not appear that a quorum was present. 3. There was no division of the property insured into two classes, after the alleged acceptance of the statute. *People's Ins. Co.* v. *Arthur*, 7 Gray, 267. 4. The requisite amount was not subscribed, to authorize the company to insure in a second class. *St.* 1849, *c.* 104, § 2. 5. The property of the defendants was of a class which the company had voted not to insure; and the defendants' policy was therefore invalid. *Mulrey* v. *Shawmut Ins. Co.* 4 Allen, 116.

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BIGELOW, C. J. The amount involved in the decision of this case is quite disproportionate to the importance of the questions, on the determination of which the right of the plaintiffs to recover depends. If some of the objections urged by the defendants against the validity of the assessments imposed on them are well taken, the result will be not only that this action must fail, but the conclusion will follow that the plaintiffs have been carrying on the business of insurance for thirteen or fourteen years on an illegal basis, and issuing policies in a manner not authorized by law. It will also follow that many of their deposit notes are illegal and void. To understand fully the nature of the main objections raised by the defendants, it is necessary to premise that, in the year 1849, by a statute of that year, c. 104, the legislature authorized mutual fire insurance companies then existing to divide the property which they might thereafter insure into two distinct and separate classes, the division of risks to be made according as the risk assumed might be deemed to belong to a greater or less hazardous description of property. The statute required that, when such a classification should have been made, each policy should designate the class to which it belonged, and that the premiums and deposits received in each class should be kept separate and distinct, and held liable to meet only those losses which might occur in the class to which they belonged. It was also required that these provisions should not take effect in reference to any company, until they should have been adopted at a meeting of the corporation called for the purpose, and that no policy should be issued to cover property in any separate class, until the amount of one hundred thousand dollars should have been insured in such class. On the 22d day of June 1860, the plaintiffs issued a policy to the defendants, purporting to insure certain property belonging to them in "the second class," and received from them a deposit note for the sum of eighty dollars, on which they have proceeded to lay an assessment, to recover which this action is brought. The defendants insist that this rule is not binding on them, and that they are not liable to pay the assessment laid upon it, because the proceedings of the plaintiffs have been irregular and illegal

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in several particulars, and the policy issued to the defendants, as well as the premium note given in consideration thereof, are without validity or legal force.

1. The first and leading objection is, that the plaintiffs were not authorized by law to make a policy in the second class, because the *St.* of 1849, *c.* 104, authorizing a division of property insured into two classes, was never legally accepted by the plaintiffs. This objection is put on two grounds. The first is, that the meeting of the corporation, at which the alleged acceptance of the act took place, was not duly called, for the reason that, being a special meeting, it could be legally assembled only in the manner prescribed by the 20th by-law of the company, on the application of ten members. But this objection proceeds on a misconstruction of the terms of the by-law and the purpose it was intended to answer. It is not prohibitory, but only mandatory. It provides a method in which the members of the company can require the officers to call special meetings. But it does not in terms or by implication restrain the directors from calling them at other times without such application, whenever in their judgment it may be expedient or necessary so to do. Certainly any such restriction on the authority of the directors would be unreasonable, and could be created, if at all, only by the most clear and explicit language. By Rev. Sts. *c.* 37, § 25, directors of mutual insurance companies are expressly authorized "to manage and conduct all the business thereof." Under the authority thus granted, there can be no doubt that legal power was vested in the directors of the plaintiff corporation to call special meetings. It is equally clear that this power was neither abridged nor taken away by the operation of the by-law on which the defendants rely, and that it was well and legally exercised in calling the meeting at which the provisions of *St.* 1849, *c.* 104 were accepted by the plaintiffs.

An equally decisive answer to this ground of defence is, that the objection to the mode of calling the meeting in question, even if well founded, is not open to the defendants. The provision of the statute authorizing a division of risks was in fact

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accepted by the corporation, and they had proceeded to act under it, and had carried on business in conformity to its enactment for ten years before the defendants became members of the corporation. By accepting a policy of insurance under these circumstances, they cannot now object to any informality in the previous proceedings. By coming in after a practical acceptance of the act for so long a period, they waived all technical defects and irregularities. They stand in no better position than a stockholder of a corporation, who is estopped from raising any objection to the legal organization of the company, after they have proceeded under an actual organization and transacted business for several years. *Chester Glass Co.* v. *Dewey*, 16 Mass. 94, 101.

The other objection to the legality of the meeting is, that a quorum of members of the company, according to the requisition of the 19th by-law, was not present at the time the act was accepted. It is true that the record does not show affirmatively that fifteen members of the company were present at the meeting. Nor is it necessary that it should. The contrary does not appear. It is sufficient that the record shows that the meeting was duly called, and proper notice of it seasonably given. The law will assume, in the absence of evidence, that a proper number were present to transact the business for which the meeting was called. Illegality will not be presumed, but the contrary. The maxim of law in such cases is, *omnia rite acta presumuntur Sargent* v. *Webster*, 13 Met. 504.

2. It is next objected that there was no actual division of the property insured into two distinct classes, as required by the statute, after its provision had been accepted by the plaintiffs. But we do not think this objection is supported by the facts which are disclosed in these exceptions. Without taking into account policies which were issued prior to August 2d 1849, purporting to be in the second class, it appears by the evidence of the secretary of the company that, between the last named date and the first day of October following, the sum of one hundred thousand dollars was subscribed to be insured in the second class, and policies duly issued therefor. This we think was

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a practical division of the risks, in pursuance of the provisions of the statute. Nor do we see how any other division of risks could conveniently be made. After the act was accepted, the company had full power to divide the risks. How could that power be exercised? Certainly it was not necessary to wait until the requisite sum was subscribed before making a division of the risks. Such a mode of carrying into effect the provisions of the statute would be hardly practicable. The only reasonable mode of making the division would be by classifying each risk when it was offered and assumed by the company. That was the time when the nature and situation of the property would be examined and considered with a view to ascertain the expediency of taking the risk, and the premium at which it would be safe and proper to insure it, and, as necessarily incident to this, would be the determination of the question into which of the two classes or divisions the risk would fall. The division, therefore, would be appropriately and properly made day by day as each risk was approved. Such was the course adopted by the plaintiffs. A set of books was opened in which the second class of risks was entered, the accounts of the two classes were kept separate and distinct, and the business of the company conducted on the basis of a division of the risks according to the statute. Whenever, therefore, the requisite amount of one hundred thousand dollars of property to be insured in the second class was subscribed and assumed by the company, the division of risks became complete and the authority of the corporation to issue policies designated as belonging to the two classes was plenary. The only irregularity was in issuing policies thus designated before the full amount was subscribed in the second class, as required by statute. But this, we think, is quite immaterial. Inasmuch as the requisite amount was obtained within a brief period after the acceptance of the act, and as all the policies in the second class issued after the 2d day of August 1849 must have been granted by the company and received by the parties insured in contemplation of the contingency that the necessary amount would be subscribed in that class. and on the implied condition that the

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statute in this particular would be complied with, we can see no good reason to doubt their legality, nor any sufficient ground for maintaining that the provision of the statute was not substantially fulfilled; especially as it does not appear that the parties to the contracts of insurance, the plaintiffs on the one hand or the assured on the other, have ever called in question their validity. Nor is this all. It affirmatively appears that the corporation have recognized all the policies issued between August 2d 1849 and the 1st of October following as valid contracts in the second class, and have fully ratified and affirmed them by including them in their annual returns, and in the reports of their treasurer and auditing committee, as constituting risks of that description duly classified under the statute..

3. The same considerations are applicable to the further objection, that it does not appear that the sum of one hundred thousand dollars was subscribed to be insured in the second class after the acceptance of the act. If the fact be so, which does not distinctly appear by the exceptions, it is shown that this sum was subscribed between the 2d day of August, five days before the vote accepting the act was passed, and the 1st of October following. The subscriptions which preceded the vote may fairly be presumed to have been made in contemplation of the immediate acceptance of the act by the company, and they have since been fully ratified and confirmed by the acts of the plaintiffs, and are not shown to have been disapproved by the assured.

These are all the objections urged by the defendants, based on irregularities and informalities in the action of the corporation in accepting the statute authorizing a division of risks into classes, and in making such division in conformity to the requirements of law. The answers we have already given to them seem to us to be decisive, and to dispose of the grounds of defence on these points. We doubt very much, however, whether the defendants are in a position to be heard in alleging such defects as a ground of resisting the plaintiffs' claim on the note in suit. The defects and technical errors on which they rely, if originally well founded and not subsequently cured, occurred many years ago, before the

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defendants became members of the corporation, and all the contracts of insurance which were made at that time, and which might have been injuriously affected by the irregular action of the corporation, have long since terminated. Nor is it shown that the rights of the defendants as members of the corporation and holders of a policy have been practically affected in an appreciable degree by these alleged errors and informalities. Under such circumstances, a party cannot be permitted to set aside his contract, unless he is able to show that its enforcement would clearly violate the settled rules of law. It is also open to question whether, under any circumstances, some of the objections relied on by the defendants would constitute any defence to this action. See *County Commissioners* v. *Aspinwall*, 21 How. (U. S.) 545. *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327. The case, however, does not require us to express a definitive opinion on these points.

5. Another objection to the maintenance of this action, of a different character, is suggested by the defendants. It is, that the contract of insurance is invalid, because the risk assumed is of a class which the company had voted not to insure. There is no evidence which supports this objection. It only appears that the directors had instructed their agents not to take risks of the kind covered by the policy issued to the defendants. But it is not shown that the directors or other officers of the corporation were prohibited or restrained, either by a by-law or vote, from issuing policies on property of such description.

Exceptions sustained.

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SUFFOLK COUNTY.*

JOHNSON WARREN *vs.* FITCHBURG RAILROAD COMPANY.

Crossing a railroad track without looking to see if a train is coming is not conclusive proof of a want of care; and if it appears that there is a double track, and a person has just bought a ticket at a station for a train which is to pass upon the further track, and the station agent says to him, "The train is coming; we will cross over," and he attempts to follow the agent, upon the premises of the railroad company, to take his place in the train, which meanwhile has arrived, and, in crossing over the nearer track for that purpose, is struck by a train coming from the other direction, and partially behind him, which he did not look for or see until too late to save himself, it is proper to submit it as a question of fact for the jury to determine whether he was careless. And while so going from the ticket office to take his seat in the cars he is to be considered as a passenger, and is entitled to the rights of a passenger; and it is the duty of the railroad company to use the utmost care and diligence in providing for him a safe and convenient way and manner of access to the train, and in preventing the interposition of any obstacle which would unreasonably impede him or expose him to harm while proceeding to take his seat in the cars, in order to prevent those injuries which human care and foresight can guard against.

TORT to recover damages for a personal injury received by the plaintiff, by being run over by the defendants' locomotive engine.

At the trial in this court, before *Merrick*, J., it appeared that on the 7th of August 1854 the plaintiff, who resided at East Boston, went to Somerville upon the defendants' railroad, and in the afternoon of that day returned to the station at that place and purchased a ticket for Boston, and waited in the station for the arrival of the train from Lexington, in which he was to be carried. There were two tracks in front of the station, and the train from Lexington was to come down upon the track which was furthest from the station. When the whistle was heard, as this train was approaching the station, Mr. Bonner, the station agent, said to the plaintiff, "The train is coming; we will cross over." Mr. Bonner and another passenger then did cross over to the platform upon the other side of the track, and reached there before the train arrived. The plaintiff immediately followed them, but did not come out of the station on to the platform in front of it until the train had arrived and

* METCALF and MERRICK, JJ., did not sit in the cases for this county.

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stopped. When he was about to step upon the rail of the track nearest to the station, he was struck by the engine of a freight train from Boston, and received the injury for which he claims to recover damages. The engineer upon the freight train testified that it was going at the rate of nine or ten miles an hour, and that the whistle was blown and the bell rung in the manner usual when approaching the station.

The plaintiff testified, amongst other things, that he had never been on that railroad before; that, as soon as the station agent said, "We will cross over," he took up a small box which he had with him and started for the train; that in crossing the platform in going to the cars he did not go in a direct course, but a little obliquely, from Boston; that he looked to see where he should get into the cars, and as he was stepping from the platform he saw the train coming from Boston, and instantly after that the sound of the whistle struck his ear; that the train was then twenty or thirty feet from him, and he had not time to save himself; that he had no intimation whatever that the train from Boston was coming; that he did not recollect that he looked towards Boston at any time after he came out of the station, until he was stepping on to the rail of the track; and that on the outside of the platform he could see an approaching train at a distance of thirty or forty rods. There was other evidence to show that a train coming from Boston could be seen from any part of the platform, at a much greater distance.

When the plaintiff's evidence was in, the defendants requested the court to rule that the plaintiff had not proved that he was in the exercise of due care at the time of the occurrence of the injury; but that, taking his own testimony to be true, (and it was not contradicted or varied in any particular in reference to this question,) it ought to be determined, as a matter of law, that he was not in the exercise of due care. But the judge declined so to rule, or to order a verdict for the defendants.

When the evidence on both sides was all in, the testimony of the plaintiff, as to his not having looked down the track towards Boston before stepping upon the track in season to avoid the approaching train, not having been contradicted or varied by

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any other evidence, the defendants renewed their motion; but the judge declined to sustain it.

The defendants then asked the court to instruct the jury as follows:

"That if the jury shall find that the plaintiff stood upon the platform of the defendants' station, or passed from the station across the platform, and attempted to cross the tracks of the defendants' railroad, to enter the Lexington train for Boston, without looking to see whether there were any obstructions upon the track or any train approaching, when he had full opportunity to see any approaching train, he was guilty of a want of ordinary care, which would prevent his recovery; and the jury should return a verdict for the defendants.

"That inasmuch as the plaintiff himself stated upon the witness stand, and admitted, that he stepped from the platform of the depot upon the defendants' track to cross over to enter the Lexington train without looking to see whether there was any train approaching, and when by looking he could have seen the train, he was guilty of a want of ordinary care, which would prevent his recovery in this case; and the jury should be instructed to return a verdict for the defendants."

The judge declined so to rule, and, instead thereof, instructed the jury that the defendants, being common carriers, were bound, in the carriage of passengers for hire, to use the utmost care and diligence in the providing of safe, sufficient and suitable engines, cars, conductors, managers and other necessary laborers, in order to prevent those injuries which human care and foresight can guard against; that a person who had purchased a ticket entitling him to a passage on a particular train was to be considered, while passing from the office or place of business where the purchase was made to the train, to take his seat in one of the cars of which it consists, as a passenger; and that the defendants were bound to exercise the same degree of care in providing for him a safe and convenient way and manner of access to the train, and in preventing the interposition of any obstacle or obstruction which would unreasonably impede him or expose him to harm and injury while proceeding to take

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his seat in the cars, as in the subsequent transportation and carriage of him; but that, if the defendants failed in any respect to use and exercise this due care, still the plaintiff could not and was not in law entitled to recover, unless he proved also, the burden of proof being upon him, that he himself, at the time of the occurrence of the injury which he sustained, was in the exercise of due care; and that due care is such a degree of care as persons of ordinary prudence and discretion would and do use when they are mindful and attentive, and mean to protect themselves against any danger to which they are exposed.

The jury returned a verdict for the plaintiff, with damages in the sum of $5750; and the defendants alleged exceptions.

J. G. Abbott & H. C. Hutchins, for the defendants.

G. A. Somerby & S. B. Hahn, for the plaintiff.

Hoar, J. The plaintiff could not recover unless he was himself using due care at the time when he received the injury, even if the carelessness of the defendants occasioned it. And the burden of proof was upon him to show that he used this care. So much is clearly settled.

In several recent cases it has been held that, if the whole evidence introduced by the plaintiff has no tendency to show care on his part, but on the contrary shows that he was careless, it is the duty of the court to direct the jury, as matter of law, to return a verdict for the defendant. *Lucas* v. *New Bedford & Taunton Railroad*, 6 Gray, 64. *Gahagan* v. *Boston & Lowell Railroad*, 1 Allen, 187. *Todd* v. *Old Colony & Fall River Railroad*, 3 Allen, 18. *Wilson* v. *Charlestown*, *ante*, 137.

We should have no doubt, if the evidence in the case at bar had disclosed nothing more than that the plaintiff crossed a railroad track, with due notice of its existence, and without looking to see whether a train were approaching, that the principle of those cases would be applicable to this. Such evidence, with nothing to explain or qualify it, would not have shown the exercise of due care, but the contrary.

But we are of opinion that the other facts which appeared in evidence had a very important bearing upon the propriety of

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the plaintiff's conduct, and that all the circumstances taken together presented a case which was proper to be submitted to the jury, and which the court could not rightfully withdraw from their consideration.

It was shown that the plaintiff had purchased his ticket entitling him to a passage to Boston, and was waiting in the passenger station for the arrival of the train; that when the whistle of the approaching train was heard, the station agent, employed by the defendants, said to him, "The train is coming; we will cross over." Upon receiving this information and direction, the plaintiff followed the station agent from the room, across toward the train, which had arrived and stopped before he came out on the platform. The path by which he went to the train was somewhat oblique, so that the engine which struck him came in a direction partially behind him. Whether, in this condition of things, in his anxiety seasonably to reach the train, which would stop but a moment, the plaintiff, at a station with which he was not familiar, would have been likely to be thrown off his guard by the direction to cross over, given without any caution or qualification; whether he might naturally, and without subjecting himself to the imputation of want of care, have considered himself under the charge of the defendant's agent, with an assurance that it was safe and proper to go directly to the cars, were questions for the jury, and not for the court. They were submitted to the jury, with instructions which were appropriate and sufficient, and to which, in the opinion of this court, the defendants had no just ground of exception.

The next exception taken was to the instruction given to the jury "that a person who had purchased a ticket entitling him to a passage on a particular train, was to be considered, while passing from the office or place of business where the purchase was made to the train, to take his seat in one of the cars of which it consists, as a passenger; and that the defendants were bound to exercise the same degree of care in providing for him a safe and convenient way and manner of access to the train, and in preventing the interposition of any obstacle or obstruction which would unreasonably impede him or expose him to

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harm or injury while proceeding to take his seat in the cars, as in the subsequent transportation and carriage of him." We think this instruction, though not strictly correct as a general proposition applicable to all cases of the kind, was not erroneous, if taken with the qualifications which the particular case afforded, and which must have been obviously understood as included in it. As a general statement it was too broad, because a passenger may buy his ticket at an office which is not in the same town, or even in the same state, in which he intends to take the cars. The railroad company have no control over his movements, and he does not, by the purchase of a ticket, put himself under their charge. But if he is "passing from the office or place of business where the purchase was made to the train, to take his seat in the cars," on the premises belonging to the company, connected with the railroad, and under the direction of the company's agents, given to him as a passenger with whom the company have made the contract for conveyance which the purchase of the ticket creates, as was the case with the plaintiff, we think he is to be considered as a passenger, and entitled to the rights of a passenger while so passing. It is the duty of the railroad company to afford to the passengers whom they undertake to carry in their cars a reasonable and safe opportunity to pass from the room or building in which they receive passengers for transportation, to the cars, when the proper time comes for them to take their seats. The purchasers of tickets are bound to comply with all reasonable rules and orders of the company or their agents, as much when going to the cars from the station house, or from the cars to a place of safety beyond the railroad track, as they are when actually on board the train, and while the transit continues. The instruction to the jury, therefore, seems to have been sufficiently adapted to the circumstances of the case, and this exception cannot be sustained.

The remaining exception was taken to the terms in which the judge who presided at the trial defined the degree of care which the law imposes upon carriers of passengers for hire. The language used was precisely that in which the rule of law was

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laid down by this court in the case of *Ingalls* v. *Bills*, 9 Met. 1. Upon a full examination and review of the English and American cases, Mr. Justice Hubbard in that case declared the result to be "that carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient and suitable coaches, harnesses, horses and coachmen, in order to prevent those injuries which human care and foresight can guard against;" and the change of phraseology in the case at bar was only that required to adapt this rule to the circumstances of the carriage of passengers by railroad.

The rule in its full extent has been recognized and affirmed in several subsequent decisions. *McElroy* v. *Nashua & Lowell Railroad*, 4 Cush. 400. *Schopman* v. *Boston & Worcester Railroad*, 9 Cush. 24. The carriers of passengers are not, like the carriers of goods, insurers against everything but the act of God and public enemies. But they are bound to exercise reasonable care, according to the nature of their contract; and as their contract involves the safety of the lives and limbs of their passengers, the law requires the highest degree of care which is consistent with the nature of their undertaking.

The defendants object that they cannot be held to the exercise of the utmost care and diligence which human care and foresight are capable of. But such was not the language of the court. They were only held to the utmost care in providing suitable and proper carriages, engines, tracks and agents, in order to prevent those injuries which human care and foresight can guard against. The object is to prevent such injuries as are the subject of human care and foresight; that is, such as are not inevitable. The duty is to use the utmost care in regard to the ordinary and usual appliances and means of carrying on their business. They are not to take every possible precaution to prevent injury; for that would be inconsistent with the cheapness and speed which are among the chief objects of railway travelling. But their care is to be exercised in relation to such matters and in such ways as are appropriate to the business they have undertaken, to afford proper and reasonable securities against danger; and it is only in regard to these, from the

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importance of the interests involved, that they are held to a proportionate, that is, to the utmost care and diligence.

Exceptions overruled.

LOUIS MEESEL *vs.* LYNN & BOSTON RAILROAD COMPANY.

The court cannot say, on a bill of exceptions, that riding upon the outside platform of a horse railroad car is such a want of ordinary care as to prevent a recovery for an injury sustained by being thrown therefrom.

TORT to recover damages for an injury sustained by being thrown from a car of the defendants.

At the trial in the superior court, before *Putnam*, J., it appeared that the defendants were a corporation authorized to run cars drawn by horses over a street railway from Boston to Lynn. The evidence tended to show that the plaintiff was a passenger having paid his fare, upon one of the cars, which was constructed in the usual manner, with a door and platform at each end; that the car was full, and he was told by the conductor to go upon the front platform with the driver, which he did; that five or six other persons were upon that platform; that the plaintiff was holding on to some small irons placed across the windows for their protection; and that, in turning a corner from one street to another, the horses were driven at an unsafe rate of speed, and the wheels left the track, and were thrown back upon it with a violent jerk by coming into contact with a side track, and the plaintiff was thrown from the car, and received the injury complained of. There was upon the car an iron rail, running up the side and across the front of the car, for the purpose of assisting passengers in getting in and out. There was no notice forbidding passengers to ride upon the platform, and the defendants were in the constant habit of permitting persons to ride there, for pay, without objection. The defendants requested the court to instruct the jury that upon this evidence the plaintiff was not in the exercise of such care as would entitle him to recover; that if he chose to ride upon the platform, under the circumstances stated, he rode there at his own risk;

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and that, as a matter of law, he was not entitled to recover. The judge declined so to rule, but submitted the case to the jury, upon the whole evidence, under instructions which were not excepted to.

The jury found for the plaintiff, and assessed the damages at $3500. To the above refusal the defendants alleged exceptions.

J. G. Abbott & D. Peabody, for the defendants.

G. A. Somerby, for the plaintiff.

CHAPMAN, J. Upon the evidence which is reported, the defendants requested the court to rule, as matter of law, that the plaintiff was not in the exercise of such care as would entitle him to recover. The court refused to make such ruling, but submitted the case to the jury; and to this refusal the defendants except.

There are cases in which the plaintiff's evidence is held to be insufficient in law to establish the fact that he exercised ordinary care; and in such cases the court rule upon it, as matter of law, without submitting it to the jury.

In *Gavett* v. *Manchester & Lawrence Railroad Co.* 16 Gray, , this course was adopted. The plaintiff was a passenger upon a train drawn by a locomotive engine. He went out upon the platform, and attempted to leave the car while the train was in motion. There being no dispute in respect to these facts, the court held that his conduct was careless. In *Todd* v. *Old Colony & Fall River Railroad*, 3 Allen, 18, and 7 Allen, 207, the plaintiff was riding in a car, which belonged to a train drawn by a locomotive. He sat upon a seat near an open window, with his elbow resting upon its base, but projecting beyond its external surface. As the train was in motion, the part of his arm which projected beyond the window was struck by a substance which was outside the car. It was held to be careless to place his arm in such a position. In *Gahagan* v. *Boston & Lowell Railroad*, 1 Allen, 187, the plaintiff attempted to cross a freight train drawn by a locomotive engine, while it was in motion, by passing between two of the cars, and this was held to be a careless act. The same doctrine was decided in *Lucas* v. *New Bedford & Taunton Railroad*, 6 Gray, 64. In all these cases the

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principle decided was, that the evidence was insufficient in law to prove that the plaintiff exercised ordinary care.

It is true that these decisions involve the consideration of facts as to which no evidence was offered. But they were well known facts in respect to the power, speed and management of railroad trains. The rule of law on this subject is well stated in 1 Greenl. Ev. § 6, as follows: "Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." In the cases above cited, it ought to be known by all persons who have anything to do with railroad trains that it is hazardous and inconsistent with the exercise of ordinary care to leave the seats provided for passengers and stand upon the platform or attempt to leave the train while it is in motion, or to sit with an elbow projecting beyond the external surface of a window, or to cross a moving train by passing between the cars.

But in respect to the facts stated in this report there is no such general knowledge as enables the court to say that the plaintiff did not use due care. On the contrary, it is well known that the highest speed of a horse railroad car is very moderate, and the driver easily controls it, and stops the car by means of his voice, his reins and his brake. In turning around an angle from one street to another, passengers are not required to expect that he will drive at a rapid rate; but on the contrary might reasonably expect a careful driver to slacken his speed. The seats inside the car are not the only places where the managers of the train expect passengers to remain; but it is notorious that they stop habitually to receive passengers to stand inside till the car is full, and then to stand upon the platforms till they are full, and continue to stop and receive them even after there is no place for them to stand except on the steps of the platforms. Neither the officers of these corporations nor the managers of the cars nor the travelling public seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained, upon the ground of its danger. There is, therefore, no basis upon which the court can decide upon the evidence reported, that the plaintiff did not use

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ordinary care. It was a proper case to be submitted to the jury upon the special circumstances which appeared in evidence, as was done in *Spofford* v. *Harlow*, 3 Allen, 176.

Exceptions overruled.

HERBERT J. BLODGETT *vs.* CITY OF BOSTON.

A person who, while using a highway simply for the purpose of play, meets with a personal injury by reason of a defect therein, cannot maintain an action to recover damages therefor against the city or town which is bound to keep the same in repair.

TORT to recover damages for a personal injury sustained by reason of a defective highway.

At the trial in this court, before the chief justice, the plaintiff, who at the time of receiving the injury complained of was eleven years old, testified that he was playing "old man on the castle" on a plank sidewalk in Washington Street, in Boston, and when another boy came to catch him, he in starting away put his foot between the planks, where it got caught, and in trying to lift it out he twisted it, and caused the injury, which proved to be very serious. The chief justice thereupon reserved for the determination of the whole court the question whether the plaintiff, under the circumstances, could maintain his action, assuming that there was a defect in the street; that the plaintiff was in the use of due care in doing the acts which occurred at the time of the accident; and that the defect had existed for more than twenty-four hours.

B. F. Brooks & J. D. Ball, for the plaintiff. If a highway is unsafe for travellers, any person sustaining an injury may recover. There is no limitation as to the class of persons who may recover. And the legislature have never intended to limit this right to travellers. *St.* 1786, *c.* 81, § 1. Rev. Sts. *c.* 25, §§ 1, 14, 21, 22. *Sts.* 1850, *c.* 5, § 1; 1851, *c.* 88, § 1. Gen. Sts. *c.* 44, §§ 1, 14, 21, 22. *Gregory* v. *Adams*, 14 Gray, 242. The policy and duty of the law are to protect all persons alike, who are lawfully using a public way. The motive and purpose of using

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the way are immaterial. The statute uses the broadest possible language. There is no reason for a distinction between persons who are using a way for purposes of pleasure and those who are using it for purposes of business. Otherwise singular results would follow. Thus, a boy running on an errand, if injured from a defect, would recover damages. Another boy running after him in sport, if injured from the same defect, would recover nothing. A man walking in a procession, with music and banners, seeking his pleasure, if injured, would recover. A boy running for play, if injured from the same defect, would recover nothing. Yet the full grown man would be using the street for play, and the boy would be using it for exercise. Why should the former be protected, and not the latter? Even if the statute extends only to travellers, that term is not limited to persons who journey from place to place, but it may include all persons who run, walk, pass or move in the street for any purpose whatever. At least, it was a proper question for the jury whether the plaintiff was a traveller or not.

J. P. Healy, for the defendants.

Bigelow, C. J. The insuperable difficulty in the way of maintaining this action is, that the plaintiff, at the time he suffered the injury for which he seeks redress, was not in the use of the highway for a purpose for which the city was bound to keep it in repair. The doctrine has been often declared by this court that the liability of towns and cities for injuries to persons or property occasioned by defects in highways is intended to be commensurate only with the duty imposed on them; that is, to keep them in repair, so that they may be "safe and convenient for travellers at all seasons of the year." This is the necessary and unavoidable implication resulting from the provisions of the statutes which impose the duty and declare the liability. In the absence of any clear and explicit enactment requiring a different interpretation, the reasonable construction of a statute which creates an obligation and at the same time prescribes the penalty or liability for its breach is, that the standard of responsibility is not intended to be greater or more extensive than the rule of duty. The latter constitutes the

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measure by which to ascertain and limit the extent of the former. It has accordingly been held that towns and cities are not liable for damages occasioned by defects in highways to persons who were not travellers thereon at the time the injury to themselves or their property was suffered. Thus in *Richards* v. *Enfield*, 13 Gray, 344, it was decided that the owner of a horse, which had escaped and run into the highway without a driver, could not recover damages for an injury to the horse caused by a want of repair in the road. The decision in that case is put on the ground that those only who are using the road for legitimate purposes in the usual and ordinary mode can claim indemnity from a town for injuries caused by a defect in the highway, and that, as the plaintiff was not using the road as a traveller when the accident happened, he was not entitled to recover. So in the subsequent case of *Gregory* v. *Adams*, 14 Gray, 242, 247, a similar statement of the rule of law was made. It was there explicitly laid down that the great and substantial purpose of the law is to afford facilities for the passage of travellers and the transportation of property over public highways; that all persons may lawfully go and travel over them with any vehicle or animal which is suitable for a way prepared for the purpose of supplying the usual and common accommodation for persons having occasion to pass over the same, and if, "when thus travelling," damage is sustained by reason of a defect in a highway, compensation may be recovered therefor of the town bound to repair the same. A like doctrine was laid down in the more recent case of *Stickney* v. *Salem*, 3 Allen, 374, in which it was held that an action would not lie to recover damages of a city for injuries sustained by a person who had stopped on the highway for the purpose of conversation, and had leaned against a railing, which by reason of its insufficiency had given way and caused him to fall.

These decisions and the rule of interpretation on which they are founded are decisive against the right of the plaintiff to maintain this action. At the time of the accident by which he was injured, it cannot be said, in any just or proper sense,

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that he was a traveller or passer on the highway. He was not using it for the ordinary and legitimate purposes for which it was constructed, and to promote and facilitate which the duty of keeping it in repair is imposed on the city. We certainly do not think that any narrow or restricted signification should be given to the word "traveller," as used in the statute. It may well embrace within its meaning, as applied to the subject matter, every one, whatever may be his age or condition, who has occasion to pass over the highway for any purpose of business, convenience or pleasure. Nor is the motive or object with which a street or way is thus used, if it be not unlawful, at all material in determining whether a person is entitled to an indemnity from a city or town for an injury occasioned by a defect. The highway is to be kept safe and convenient for all persons having occasion to pass over it, while engaged in any of the pursuits or duties of life. If this be not the limit beyond which the duty and the corresponding liability of cities and towns in relation to the subject matter do not extend, we are unable to see where the line can be drawn. And yet it is plain that there must be some such limit. A town cannot be held responsible for every case of damage to person or property which may happen by reason of a defect in a highway, without regard to the use to which it was appropriated at the time of the accident by the person injured. Suppose, for example, a juggler or gymnast should occupy a portion of a street or road to exhibit his feats of skill or agility and strength. He certainly could not be regarded in the light of a traveller while so using the highway, nor could he claim damages of a city or town for injuries sustained by him in his person or property during his performance, although they might have been occasioned in whole or in part by a defect in the highway. Take another example of a different character. A boy, while using a portion of the highway solely for the purpose of enjoying the amusement of sliding over the snow in a sled, meets with an injury attributable to some defect arising from the accumulation of snow or ice. It would hardly be contended that the town or city in which such an accident happened could be held liable

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for the damages thereby occasioned. These and other like cases strike the mind at once as falling very clearly outside the limit which the law fixes to the liability of towns and cities for injuries caused by defects or want of repair of highways. But they do not differ in principle from the case at bar. Such cases not only do not come within any reasonable construction of the language of the statute creating the duty and imposing the liability on towns, but it would be extremely difficult if not impracticable to apply to them the test of due and reasonable care in the use of the highway, which is an element essential to the maintenance of an action against a town for damages suffered on the highway. We by no means intend to say that a child who receives an injury caused by a defect or want of repair in a road or street, while passing over or through it, would be barred of all remedy against a town merely because, at the time of the occurrence of the accident, he was also engaged in some childish sport or amusement. There would exist in such a case the important element that the person injured was actually travelling over the way. But this element is wholly wanting in the case at bar. We have here the naked case of an appropriation of a portion of a public street to a use entirely foreign to any design or intent to pass or repass over it for the purpose of travel within the meaning of the statute. It is to this precise case that we confine the expression of our opinion. For the reasons already given, we are constrained to say that the plaintiff is not entitled to maintain his action. See *Stinson* v. *Gardiner*, 42 Maine, 248. *Judgment for the defendants.*

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JEROME DANFORTH *vs.* HENRY DURELL.

If a private way is opened, leading from a public street, and prepared for use in the same manner as a public street, and with nothing to show that it is not such, the public may lawfully travel over it, although it is closed at one end; and in so doing they are bound only to the same degree of care, in respect to others who are also lawfully using it, as in travelling over public streets.

TORT to recover compensation for injuries sustained by being run over by the defendant's horse and wagon.

At the trial in this court, before *Merrick*, J., it appeared that the injury was received in that portion of Auburn Street, in Boston, which is north of Livingston Street, and which was a private way, laid out with brick sidewalks and a carriage way between, and with nothing to show that it was not a public street. The private way was open only at one end, where it entered upon Livingston Street, and the children of the abutters, of whom the plaintiff was one, were accustomed, by prescription, to play therein. The defendant, who was a grocer, had sold some articles to a person who lived upon the other portion of Auburn Street, and sent the same in his wagon to be delivered. Neither he nor his servant knew in which part of the street the purchaser lived; and the servant drove into that part which was laid out as a private way, and ran over the plaintiff, who was at play there with other boys.

The plaintiff requested the court to instruct the jury as follows:

1. That if Auburn Street, where the plaintiff was run over, was a private way or court, laid out for the use of those abutting, and was closed at the end, and if the driver of the defendant's horse and wagon might, upon reasonable inquiry, have ascertained that the house to which he was bound was not in the part of Auburn Street north of Livingston Street, and drove into the court, and injured the plaintiff while the plaintiff was in the exercise of ordinary care, the defendant is responsible for the damage sustained by the plaintiff.

2. That to drive into the court by mistake as to the place of

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residence of the customer to whom the goods sold were to be carried, which, by reasonable attention in making inquiries upon the subject, could have been avoided, and having no other business in the court than the delivery of the goods, or the finding of the place where they were to be delivered, without giving warning to children of abutters residing on Auburn Street, and then playing there, would be negligence on the part of the driver; and the driver would, in such case, be a wrongdoer; and the defendant, in whose employment he was, would be liable for his acts and the consequences thereof, whether the plaintiff was or was not in the exercise of ordinary care.

3. That if the locality where the plaintiff was run over was a private street or place, where children of the abutters and others habitually resorted for play, the defendant and his servant were bound to know the customary use of the street, and to exercise such care in driving into it as this customary use of the street required.

The judge declined to adopt the proposed instructions; but, intending to reserve them for the consideration of the whole court, did instruct the jury as follows:

That the opening of Auburn Street by the proprietors of the land in the manner in which it was prepared for use and travel, and connecting it with Livingston Street, which is a public way, and suffering it to be so connected and opened, without any notice or indication that it was not a public way, or that it was reserved for private use, was a license to the whole public to use it in the same way and manner, and with the same rights, as if it was a public street duly established; and, therefore, that the defendant's servant had a right to enter upon and drive his horse and wagon into the street, the same as if it was a public way.

That the children of abutters might lawfully play in Auburn Street, it being a private way, by the permission of the abutters but that the defendant or his servant would not be bound to know the customary use of said street as a place for the children to play; and unless they had knowledge of such use or were in some way notified thereof, would not be bound to drive there with any more care than if such street were not so used

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That the defendant's servant was bound to use, in the business in which he was then engaged, only the same degree of care in Auburn Street as if it had been a public street.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

R. F. Fuller, for the plaintiff, cited *Hemphill* v. *Boston*, 8 Cush. 195; *Gowen* v. *Philadelphia Exchange Co.* 5 Watts & S. 141; *Stafford* v. *Coyney*, 7 B. & C. 257; *Simmons* v. *Mumford*, 2 R. I. 172; *Campbell* v. *Lang*, 1 Macq. H. L. Cas. 451; *Hawkins* v. *Carbines*, 3 Hurlst. & Norm. 914.

A. Russ, for the defendant.

CHAPMAN, J. It appears that Auburn Street, though a private way, was opened and prepared for travel, with brick sidewalks on each side, and a carriage way between them, and with nothing to indicate that any persons were to be excluded from using it. A public street crossed it. The opening of a way in this manner, with the ordinary indications that it is a way for public use, constitutes a license to the public to use it for all the purposes to which it is adapted. Washburn on Easements, 133. Foot passengers may walk upon the sidewalks, and carriages may be driven over the carriage way, until the license is revoked. Many private ways are thus left open to public use. See *Durgin* v. *Lowell*, 3 Allen, 398. And if the opening of such ways were not to be regarded as a license to the public to use them, it would seem, as Mr. Washburn well remarks, "as a trap to innocent passengers."

The fact that Auburn Street was a place, court or *cul de sac*, and not a thoroughfare open at both ends, is not material. Such places are very common in cities. Some of them are private and some are public. Some are not adapted for travel with carriages, as was the case with the way referred to in *Hemphill* v. *Boston*, 8 Cush. 195. Some are prepared for carriages and connected with a thoroughfare for foot passengers. They are most commonly like Auburn Street, with sidewalks and a carriage way throughout their whole length, and the license to use them, when they are private, is limited by considerations of obvious propriety to the species of travel for which they are prepared, and to which they are adapted.

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Those who use such ways must in using them exercise reasonable care, adapted to the circumstances of the case. This limitation of the license is also founded in obvious propriety; and it is the same rule which exists in regard to the use of highways. There is no good reason for adopting a different rule from this in either case; nor are travellers bound to know whether a way thus opened is public or private. It would be unreasonable to require such knowledge, even if the fact of knowledge were material. But as the use may be the same in either case, the knowledge is not material.

Neither is the fact material that children were accustomed to play there, either by prescription or by license. They are accustomed to play also on public ways, and may lawfully do so, using reasonable care, and doing nothing injurious to others. Therefore the way was not different in this respect from public ways.

Such being the rights of the parties, the instructions given to the jury were accurate, full and sufficient, and the plaintiff's request for instructions was rightly refused. None of the facts referred to in the request for instructions were material to the decision of the case. *Exceptions overruled.*

Malden and Melrose Railroad Company *vs.* City of Charlestown.

If the expense of keeping a bridge in repair is imposed by statute upon several towns and a railroad company jointly, with a provision that the municipal authorities of one of the towns shall have the care and superintendence of it, and shall employ all services necessary in the care of it, no action lies against said town, in favor of the railroad company, to recover for damages sustained by the latter in consequence of a defect in the bridge.

Tort to recover for damages to the plaintiffs' car, and for damages recovered of the plaintiffs by passengers therein, sustained by reason of the car's coming in contact, on Malden Bridge, in Charlestown, with a swinging gate, which the defendants had carelessly left unfastened. The declaration contained

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several counts. After the plaintiffs had opened their case, in the superior court, *Allen*, C. J. ruled that, upon the true construction of the statutes upon which the liability of the defendants depended, the plaintiffs were not entitled to recover, and ordered a verdict for the defendants, which was returned accordingly; and reported the case for the determination of this court.

C. M. Ellis, for the plaintiffs.

J. Q. A. Griffin, for the defendants.

Hoar, J. The foundation of this action, in all its forms of declaration, is the liability of the defendants for an obstruction, defect and want of repairs in and upon the Malden Bridge; and if they have no responsibility for the condition of the bridge, except jointly with the plaintiffs, it is manifest that the action cannot be maintained.

The bridge, where the obstruction was found and the injury to the plaintiffs' car occurred, was situated in the city of Charlestown. By Gen. Sts. *c.* 44, § 1, "highways, town ways, streets, causeways and bridges shall be kept in repair at the expense of the town, city or place in which they are situated, when other provision is not made therefor;" and by § 22 of the same chapter, if a person receives bodily injury or damage in his property, through a defect or want of repair in a bridge, he may recover the amount of damage sustained thereby, of the county, town, place or persons obliged by law to repair the same.

By referring to *St.* 1859, *c.* 99, § 2, it appears that "other provision" is made for the repair of this bridge, than the general obligation imposed upon the city in which it is situated. That section expressly provides that "the said bridge shall be kept in repair at the expense of the city of Charlestown," six other towns named, "and the Malden and Melrose Railroad Company." The same statute provides the manner in which the expense shall be apportioned and assessed upon the several corporations thus jointly made liable; and by § 6 it is directed that "the mayor and aldermen of the city of Charlestown shall take the care and superintendence of said bridge, and shall employ all services necessary in the care thereof." We think this

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provision does not affect the responsibility of the defendants for the maintenance of the bridge. The several corporations required to pay the expense of maintaining it having no common agents or officers to whom the duty of taking charge of it could be conveniently assigned, the mayor and aldermen are designated for that purpose. But they are made the agents of all the parties who are required to support the bridge, and not of one of them exclusively. A city, town or county is not necessarily responsible for the care and fidelity of its officers in the execution of duties imposed on them by law. If the care of this bridge had been intrusted to the county commissioners of Middlesex County, it would not have made the county liable for its condition. The responsibility for the safety and convenience of the bridge, and the liability to pay the damages occasioned by defects or want of repair in it, being by law imposed upon the parties "obliged by law to repair it," and the plaintiffs and the defendants being each one of these parties, one of them cannot maintain an action against the other founded on a common neglect of duty. *Judgment on the verdict.*

City of Lowell *vs.* Henry K. Oliver.

The *St.* of 1863, *c.* 218, providing for the reimbursement of bounties paid by cities and towns to volunteers, and apportioning and assessing a tax therefor, will not be declared invalid on the ground that the tax which it imposes is disproportionate and unequal, or that the sums to be raised under the same are to be unequally distributed among cities and towns, or that the legislature have no authority to raise money by taxation for the payment of bounties to soldiers of the United States, or to reimburse bounties already paid to them by cities and towns, or that it is apparent from the statute itself that the legislature did not intend that a tax should be levied under it.

This court cannot say that a city or town may be excused from levying a tax according to the requirement of *St.* 1863, *c.* 218, on the ground that an insufficient time was allowed for the assessment and collection thereof, although the warrant for the tax was not received from the state treasurer until the ordinary taxes of such city or town had been assessed and committed to its treasurer for collection.

Under Gen. Sts. *c.* 15, § 32, the governor may instruct the state treasurer to withhold the payment of a portion of a sum of money due to a city or town, after he has, with the advice of the council, executed and delivered to the treasurer a warrant for the payment thereof, if such city or town illegally withholds money due to the Commonwealth.

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MANDAMUS, reciting that the city of Lowell, by their petition, had given the court to understand that under and by virtue of *Sts.* 1861, *c.* 222; 1862, *c.* 66; and 1863, *c.* 79, they had raised by taxation and otherwise and paid the sum of $83,000 to the wives, children, parents, brothers and sisters, dependent upon those who had been duly enlisted and mustered into the volunteer service of the United States, and in all respects complied with said several statutes, and made return of the moneys paid, according to law; that by *St.* 1863, *c.* 250, an appropriation was made to reimburse the cities and towns of the Commonwealth for moneys paid to their inhabitants under said statutes; that the sum of $83,000 was due and payable to the city of Lowell for the moneys so paid by them, and was in the hands of the respondent, as treasurer and receiver general of Massachusetts; that the city had demanded payment thereof, which had been refused; and that the city did not owe any sum to the Commonwealth. The writ ordered the respondent to make payment of said sum, or show cause to the contrary.

The answer of the respondent set forth that it is not within the jurisdiction of the court to compel him to pay money of the Commonwealth out of the treasury thereof; that the Commonwealth does not owe said sum of $83,000 to the city of Lowell, but said city has an unadjusted account with the Commonwealth, and the governor has instructed the respondent to withhold all payments of money to them while they continue to withhold money from the Commonwealth, unless they would be content to receive the balance due upon an adjustment of all debts and credits, to wit, $61,356.83, which sum the respondent has offered and is ready to pay; that by *St.* 1863, *c.* 218, passed April 29th 1863, a tax was duly assessed upon the several cities and towns of the Commonwealth, amounting in all to $3,413,751.83, of which sum $80,543.17 was duly apportioned to the city of Lowell, and a warrant was thereupon issued by the respondent and sent, with a copy of the statute, to the assessors of Lowell, requiring them to assess the sum so apportioned to them, and to add the amount to the amount of town and county taxes to be assessed by them on said city, and to

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pay, or to issue their warrant requiring their city treasurer to pay, the said sum to the respondent, on or before the 1st day of December 1863; but said city have refused to pay the same, alleging that the tax was unconstitutional; and, because of said refusal, the respondent, under the instructions of the governor, has declined to pay the sum which the city now seek to obtain.

A replication was filed, setting forth, among other things, that the sum claimed of the city, under the tax provided for by *St.* 1863, *c.* 218, is about $21,500, and that said tax and statute are illegal, unconstitutional and void, because the cities and towns of the Commonwealth were not authorized to pay the bounties sought thereby to be equalized; because said bounties, varying from fifty to five hundred dollars in the several cities and towns, were not thereby equalized, and cannot be made valid by legislative enactment; and because the city of Lowell, having raised her full quota of men for nine months by the payment of a bounty of fifty dollars to each, is by said statute compelled to pay the sum of fifty dollars for each man to other cities and towns of the Commonwealth.

In addition to the facts stated in the writ, answer and replication, it was agreed that the city of Lowell furnished its full quota of troops under the calls of the president of the United States issued in July and August 1862, and paid a bounty to them of about $48.25 each; that the average bounty paid by all the cities and towns in the Commonwealth was about $133.13 to each man; that the bounty reimbursed to the cities and towns under *St.* 1863, *c.* 218, was about $99.03 per man; that the warrant for taxation under said statute was received by the city of Lowell on the 8th of September 1863, which was after its taxes for that year had been assessed and made out; that on the 1st of December 1863 the governor, with the advice and consent of the council, drew his warrant for $1,762,322.18, in pursuance of the several statutes above referred to, to be paid to the several cities and towns, and that said warrant is now on file in the respondent's office; that the respondent thereupon credited the several cities and towns with the respective amounts due to them out of said sum, the city of Lowell being credited

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with the sum of $83,000, which sum now stands to their credit upon the roll; that he has paid to all of the cities and towns except Lowell the sums so credited to them, and all of the cities and towns except Lowell have paid all balances due from them to the Commonwealth; that the only instruction given by the governor to the respondent to withhold money from Lowell was dated December 22d 1863, and was in these words: "In conformity with the legal opinion of the attorney of the Commonwealth, let the treasurer of the Commonwealth pay to the city of Lowell the aforesaid balance only, unless either by judicial decision or legislative authority it shall be otherwise determined;" and that the respondent refused to pay to Lowell the sum of $83,000, or any part thereof, unless the city would deduct therefrom the sum of $21,643.17, alleged to be due from the city to the Commonwealth on account of the tax imposed by *St.* 1863, *c.* 218.

It was also agreed that copies of the president's proclamations and calls for troops, and of the orders of the governor concerning the same, might be referred to.

T. Wentworth, for the relators.

Foster, A. G., for the respondent.

Bigelow, C. J. We have not deemed it necessary to determine the preliminary question, whether a writ of mandamus is a proper remedy, which this court has power to enforce against the respondent in his official capacity, for the purpose of redressing a grievance like that which is set forth in the petition of the relators. The main questions at issue between the parties have been very fully and ably discussed at the bar. We have given to them very careful consideration, and, having arrived at conclusions which are decisive of the merits of the case, we have not stopped to discuss a question which is immaterial to the final disposition of the cause.

The ground on which the relators put their claim to relief is in substance, that they are entitled to receive from the respondent, as treasurer of the Commonwealth, the full sum of eighty-three thousand dollars, being the amount or proportion due to them for moneys advanced in aid of the families of persons,

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inhabitants of Lowell, who had enlisted and been duly mustered into the military service of the United States; that this sum is due to them under the several acts of the legislature set out in the writ, as appears by the roll kept by the respondent, in which the relators are credited therewith as their share of the whole sum to be paid and distributed among the several towns and cities of the Commonwealth, according to a warrant of the governor drawn on the first day of December last. The right of the relators to receive this sum is denied by the respondent, on the ground that there is due to the Commonwealth from said relators and unpaid by them the sum of about twenty-two thousand dollars, being the balance due from said city of the tax apportioned to and to be assessed by said city for the reimbursement by the Commonwealth of bounties paid by cities and towns to volunteers under *St.* 1863, *c.* 218, after deducting the amount of reimbursement to which said city is entitled according to the provisions of the same act; that the Commonwealth has a right to deduct from the sum of eighty-three thousand dollars, due to said city as aforesaid, the above balance of about twenty-two thousand dollars; that this right is denied by the relators; that there is, by reason of such conflicting claims, an unadjusted account between said relators and the Commonwealth, within the meaning of Gen. Sts. *c.* 15, § 32, and that the governor of the Commonwealth, having received satisfactory information that said sum of about twenty-two thousand dollars is illegally withholden from the state by said relators, has instructed the respondent to withhold all payments of money to them, in pursuance of the provisions of the statute last cited.

To the answer of the respondent, setting out these grounds of defence to the claim of the relators, they reply that it shows no valid or legal excuse for the refusal of the respondent to pay them the sum to which they are entitled for aid furnished to the families of volunteers, and they allege various reasons on which they rely and insist to show the insufficiency of said answer and the validity of their claim. The first and most important one is, that the provisions of *St.* 1863, *c.* 218, directing an apportionment and assessment of a tax to and among the several

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cities and towns of the state for the reimbursement of bounties paid by them to volunteers are unconstitutional and void, and that no claim can be justly made on them by the respondent in behalf of the Commonwealth for any portion of said tax. In considering this grave objection to the statute, it is necessary to have distinctly in mind that by the constitution the right to impose and levy taxes is vested in the legislature in very broad and comprehensive terms. The framers of that instrument were not unmindful of the necessity of providing that the government which they were about to establish should possess, within the sphere in which it was designed to operate, those powers which are essential to sovereignty, and to vigorous and efficient action. They were also well aware, by the experience through which they had passed, that the power of imposing taxes, though inherent and necessary as a means of supporting and carrying on a government, was a difficult and delicate one, always regarded with jealousy by those on whom it is to be exercised, and concerning which there should be clear and explicit provisions in the frame of government, in order that there should be no doubt or dispute, either as to the existence of the power or as to those to whom the authority to use it was delegated. It was therefore deemed important to declare, among the fundamental principles on which the government was to be based, that "no subsidy, charge, tax, impost, or duties ought to be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives in the legislature." Declaration of Rights, art. 23. The right thus recognized and declared was secured by a corresponding provision in the frame of government. In creating and establishing the legislative department, it is provided, among other things, that full power and authority are given and granted to the general court "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident and estates lying within the said commonwealth; . . . . to be issued and disposed of by warrant under the hand of the governor of this commonwealth for the time being, with the advice and consent of the council, for the public service, in the necessary

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defence and support of the government of the said commonwealth, and the protection and preservation of the subjects thereof, according to such acts as are or shall be in force within the same." And it is further provided that, "in order that such assessments may be made with equality, there shall be a valuation of estates within the Commonwealth, taken anew once in every ten years at least, and as much oftener as the general court shall order." Const. of Mass. *c.* 1, § 1, art. 4; § 2, art. 2. From these provisions, it is apparent that the power of the legislature as to the imposition of taxes is clearly defined, and that the delegation of authority, although very full and ample, and, from the nature of the subject matter, expressed in general terms, is nevertheless subject to restrictions, which are embraced under three heads or divisions. The first is, that the taxes imposed must be proportional and reasonable; the second is, that they must be laid according to a valuation of all estates in the Commonwealth, made within the current decade; and the third and last is, that they shall be levied for objects which are within the general purposes enumerated in the clause of the constitution already cited, for which public money may properly be expended.

We do not think it material, in the present case, to inquire how far it is competent for the judicial department of the government to interpose its authority to prevent the collection or payment of a tax, on the ground that the legislature in imposing it have transcended the limits within which it is empowered by the constitution to act. It may be questionable whether some of the restrictions which the constitution imposes are not in their nature directory, designed as a guide for the discretion of the legislature, and not as an absolute limitation on its powers. For example, is it within the province of this court to decide whether a tax is reasonable, and, if in their judgment it is not, to overrule the action of the legislature, and declare the statute imposing it unconstitutional and void? Could such a power be exercised without trenching on another explicit provision of the constitution, that the judicial department shall not exercise legislative powers? Declaration of Rights, art. 30. But

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waiving these and other similar questions, the answers to which are not material to the decision of the present case, and assuming that this court has the power to afford a remedy to the relators, if their alleged grievance is well founded, we have only to inquire whether the statute in question is obnoxious to the objections urged against it, as being an unauthorized and invalid exercise of the power of taxation intrusted to the legislature The tax which it imposes certainly cannot be said to be disproportionate or unequal. It is imposed in exact accordance with the provisions of the constitution and laws. It is levied on *all* the polls and estates in the Commonwealth, according to the last decennial valuation, in the same manner as the aggregate of the annual state tax is apportioned for the current year. And it is now conceded by the learned counsel for the relators, that the respondent has calculated with fidelity and accuracy the several sums for which each city and town is liable to assessment on the basis prescribed by the statute. Where then is the inequality or disproportionate assessment of which the relators complain? If we understand the argument on this point urged in behalf of the relators, the objection is not that the tax was not apportioned and laid in a proper and legal mode, but that the money which is to be raised by means of the tax is not to be distributed or paid out of the treasury of the Commonwealth among the several towns proportionally or equally; in other words, that it is to be disbursed neither according to the valuation of the property in the several towns, nor yet according to population, but that the basis of distribution is the number of enrolled soldiers enlisted as volunteers from each town in the service of the United States under the calls of the president issued in July and August 1862; and that even on this basis the distribution of the money is unjust and unequal, because the several towns do not receive the same sum for each enrolled soldier furnished by them, but only the amount of bounty actually paid to such soldier, and not even that, if it exceeds one hundred dollars. Conceding that this is a true statement of the mode of distribution of the proceeds of the tax, as prescribed by the act, we are at a loss to see in what way this alleged

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inequality of distribution affects the validity of the tax itself. We know of no provision either in the constitution or laws which requires payments to be made from the public treasury according to any principle of apportionment or equality. If the tax is duly apportioned and levied, and the purpose for which the money is raised is within the purview of the objects enumerated in the constitution, for which the funds in the treasury may be drawn out and expended, there is certainly no violation of any restriction, either express or implied, on the power of the legislature. On the contrary, within the sphere of action prescribed by the constitution, the authority of the legislature is supreme. The mode or amount of appropriation of public money for legitimate objects is exclusively a matter of legislative discretion, which can neither be regulated nor controlled by the judicial department of the government.

This brings us to a consideration of another objection to the validity of the tax in question, which has been suggested by the learned counsel for the relators. Starting with the admitted proposition that the disposition of money raised by the legislature by means of a tax is expressly limited by the provision of the constitution already cited, *c.* 1, § 1, art. 4, the relators insist that the proceeds of this tax are not appropriated for a purpose which comes within the fair scope of this provision. If this be so, then it is also true that the money which the relators seek to recover of the Commonwealth, and by means of these proceedings are endeavoring to have the respondent commanded to pay over to them, has been unlawfully appropriated by the legislature, in violation of the same clause of the constitution as that on which the relators rely to establish the invalidity of the disposition of the proceeds of the tax which they refuse to pay. It certainly needs no argument to sustain the proposition that, if it is an excess of authority in the legislature to appropriate money raised by taxation for the payment of bounties to volunteers enlisted in the service of the United States, or to reimburse towns and cities for such bounties advanced by them, *a fortiori*, the payment of money from the public treasury in aid of the support of the families of such volunteers, or to refund

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to towns and cities the sums advanced by them for such purpose, is unlawful and without authority.

But it is not necessary to put this part of the case on so narrow a ground. The objection on which the relators insist is open to a more comprehensive and decisive answer. The use of the money to be raised by the tax in question for the purpose for which it is appropriated by the statute is within the letter of the constitution, as well as its spirit. It is in the strictest sense a disposition of the money "for the public service, in the necessary defence and support of the government of the said commonwealth, and the protection and preservation of the subjects thereof." These words are not to be interpreted with reference merely to the reciprocal duties and obligations subsisting between the government of the state as established by the constitution of Massachusetts, and the people of the Commonwealth as the subjects of that government. By the ratification and adoption of the constitution of the United States, a portion of the allegiance which each citizen originally owed exclusively to the government of the state was transferred to that of the United States. The government and people of the state became thereby bound to defend and support the national government, and to bear their part or proportion of the burden of "protecting and preserving" it from the assaults of domestic foes as well as of foreign enemies. To the extent of the new relation thus created and the new duties and obligations thus assumed, the provisions of the constitution must be deemed to have been modified and changed, in order that the two governments, each supreme within its appropriate sphere of action, might be adapted to each other and work harmoniously together. No one can doubt that it would have been competent for the legislature to expend money raised by taxation for the purpose of supporting and defending the government of the state against treason and rebellion, while the whole sovereignty was vested in it under the constitution of Massachusetts. It certainly cannot be deemed to be an excess of authority or an illegitimate use of the public moneys, to appropriate them to the preservation and protection of the government to which a

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portion of that sovereignty has been transferred, against similar attempts to weaken and destroy it.

Nor do we see any force in the suggestion that the appropriation of the money raised by the tax in question was unlawful or unauthorized, because it was designed to reimburse payments already made by towns and cities, and not for the purpose of meeting present exigencies or discharging prospective liabilities of the Commonwealth. If the object of the appropriation is a legitimate one, it is quite immaterial whether the money has been actually expended and the tax is laid to pay a debt previously incurred or for the reimbursement of sums advanced by third persons for a public object, or whether it is to anticipate expenditures which the future requirements of the public service may render expedient or necessary. We can see no valid distinction in principle between a right to raise money for a specific object yet to be accomplished, and a right to raise it to defray the expense of the same object after it has been attained.

To the further objections urged by the relators to the validity of the tax, that it is apparent that the legislature did not intend that any tax should be levied under the statute, and that in effect the provisions of the act are designed only to declare that a certain class of towns is indebted to a certain other class, it is a sufficient answer to say that these grounds of objection are not only contrary to the letter of the statute and its clear and explicit enactments, but that they can be supported only by imputing to the legislature a want of good faith and fair dealing for which we can see no warrant whatever.

Two objections of minor importance were urged in behalf of the relators in support of their claim to a writ of mandamus, which may be briefly disposed of. One is, that it was impossible to add the tax, which the statute imposed, to the county and city taxes for the year 1863. But the facts disclosed do not support this objection. It only appears that the county and city taxes had been made up and committed to the treasurer of the city for collection. It is not shown, however, that he had taken any steps to collect those taxes, nor that the warrant to him might not have been recalled for the purpose of adding the

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tax which the relators were directed to levy by the warrant of the treasurer of the Commonwealth in pursuance of the provisions of the statute. It is also alleged that the time allowed to the assessors of the city of Lowell for the assessment and collection of the tax in question was unreasonable and insufficient. No facts are shown which sustain this allegation. We cannot judicially know that the time between the receipt of the warrant from the treasurer of the Commonwealth and the day when the tax was due and payable to the state was not amply sufficient for its assessment and collection.

The only remaining objection is, that the respondent was not justified in withholding from the relators payment of the full sum demanded by them, under the instructions of the governor. This objection is put on two grounds. The first is, that no authority is vested in the governor to give such instructions to the treasurer of the Commonwealth after a warrant has been drawn by the governor with the advice and consent of the council, and delivered to the treasurer. But such power is expressly conferred on the governor by Gen. Sts. *c.* 15, § 32, wherever there is an unadjusted account between the Commonwealth and the person claiming money from the treasury. The exercise of this authority thus vested in the governor does not give him the power to set aside the warrant of the governor and council. That remains in full force. The effect of the instruction which the governor is authorized to give is only that the sum due from any person to the Commonwealth shall be taken in payment of the amount due to him under such warrant. The statute merely provides for an equitable adjustment of claims due to and from the Commonwealth.

The other ground is, that the governor is authorized only to direct the treasurer to withhold all payments of money to any person with whom the Commonwealth has an unadjusted account, and that this authority was not duly exercised in the present case, because the order from the governor only directed the treasurer to withhold from the relators the amount due to the Commonwealth, and to pay to them the balance after deducting that sum. But the greater includes the less. An

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authority to instruct the treasurer to withhold an entire sum includes the power to retain a portion of such sum. But were it otherwise, in the exercise of our discretion we should certainly refuse to interfere by mandamus to order the respondent to pay over to the relators the entire sum which they claim, in a case in which it is made satisfactorily to appear that they are not justly entitled to receive it.

Upon the whole case, confining the expression of our opinion to the grounds of objection to the validity of the tax urged by the relators, our judgment is that they are not entitled to the writ. *Peremptory mandamus refused.*

Asa Low *vs.* Sidney Bartlett & others.

If ancillary administration is taken out in another state upon the estate there of a deceased citizen of Massachusetts, a judgment there rendered, establishing a claim against the estate, is not binding here, and cannot be proved against the estate here; nor can the creditor establish his claim here against the executor, or against the legatees, to compel them to refund money paid to them by the executor, after the expiration of the time limited for the presentation of claims against executors, although the judgment was rendered after the expiration of such time.

Bill in equity brought on the 14th of September 1863, seeking to establish and enforce against the estate or legatees of Benjamin B. Mussey, late of Boston, deceased, a judgment recovered by the plaintiff in Vermont, where ancillary administration upon Mussey's estate had been taken out. The several defendants demurred to the bill, and the case, which is sufficiently stated in the opinion, was reserved by the chief justice for the determination of the whole court.

R. McK. Ormsby, of Vermont, (*A. W. Boardman* with him,) for the plaintiff. There is a privity of estate, or by law, that should render a judgment *de bonis testatoris* against one administrator conclusive against the estate in the hands of all. A judgment against an executor is binding on the administrator

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de bonis non. 2 Saund. 72 *r.* And the laws universally recognized in administering the estates of deceased persons, when situated in different states, create a privity by comity between the different administrators. If the estate is in different states, and is insolvent, the creditors all share in proportion to their respective claims, each administrator being dependent, for the basis of his dividends, on the administrators in other states. *Vroom* v. *Van Horne*, 10 Paige, 556. In the present case the claim is not on the executor, but on the trustees and legatees. Heirs and legatees are in equity liable to creditors, to the amount of assets received by them. *Noel* v. *Robinson*, 1 Vern. 94. *Hodges* v. *Waddington*, 2 Vent. 360. *Davis* v. *Davis*, 1 Dickens, 32. *Gregory* v. *Forrester*, 1 McCord Ch. 318. This claim is the judgment of a sister state, rendered since the expiration of the statute limitation for presenting claims here, and therefore comes within Gen. Sts. *c.* 101, § 31. This judgment is conclusive upon the heirs and legatees, if not upon the executor. There is a privity between them and each executor or administrator. A man leaves but one estate, though it may be in various jurisdictions; and there is a privity between him and all his administrators. It is the duty of each administrator to see that none but just claims are allowed against his estate. There was a litigation in this case. Must a creditor pursue his claim through several states, picking up a little property here and a little there, and litigate in every state? *Brown* v. *Ricketts*, 3 Johns. Ch. 553. Com. Dig. Chancery, 2 A; Accompt, 2 A 1. *Stone* v. *Wood*, 16 Illinois, 177. *Garnett* v. *Macon*, 6 Call (Va.) 337. An executor is in some respects different from an administrator. He accepts the trust of administering the whole estate, wherever situated. There is necessarily a privity between him and a foreign administrator. *Hill* v. *Tucker*, 13 How. (U. S.) 458, 459. *Latine* v. *Clements*, 3 Kelly (Ga.) 426.

B. F. Thomas, *D. Thaxter & R. Olney*, for the defendants, cited Story Confl. Laws, 522, and cases cited; *McLean* v. *Meek*, 18 How. (U. S.) 16; *Stacy* v. *Thrasher*, 6 How. (U. S.) 44, 60; *Aspden* v. *Nixon*, 4 How. (U. S.) 467; *Slauter* v. *Chenowith*,

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7 Indiana, 211; *Payne* v. *Payne*, 29 Verm. 172, 176; *Porter* v. *Heydock*, 6 Verm. 374; *Grout* v. *Chamberlin*, 4 Mass. 611; *Royce* v. *Burrell*, 12 Mass. 395; *Hall* v. *Bumstead*, 20 Pick. 2; *Valentine* v. *Farnsworth*, 21 Pick. 176; *Fay* v. *Haven*, 3 Met. 114–116; *Phillips* v. *Rogers*, 12 Met. 405; *Norton* v. *Palmer*, 7 Cush. 523; *Yaites* v. *Gough*, Yelv. (Amer. ed.) 33. *Allen* v. *Irwin*, 1 S. & R. 549.

CHAPMAN, J. The plaintiff is an inhabitant of Vermont, and brings his suit to recover the amount of certain claims which he alleges were originally due to him from Benjamin B. Mussey, late of Boston, who died in January 1857. Mr. Bartlett, one of the defendants, was appointed executor of the last will and testament of Mussey in February 1857; the defendants Thomas and Perkins are trustees appointed by the court to receive the legacies given in trust for his two minor sons; and the other defendant, Frank B. Mussey, is one of the sons who has come of age.

A part of the plaintiff's original claim was for services which, according to the allegations of the bill, were rendered more than six years before the decease of said Mussey. To this the defendants set up the statute of limitations, Gen. Sts. *c.* 155, as a bar. Another part of the claim is for money which is alleged to have been paid by the plaintiff to Mussey for usurious interest, more than two years before his decease. To this the limitation contained in Gen. Sts. *c.* 53, is set up as a defence; and in answer to the whole claim the defendants rely upon the limitation contained in Gen. Sts. *c.* 97, § 5, which limit actions against executors to two years after they shall have given the statute notice of their appointment.

It is conceded that these several defences must prevail, were it not for other facts alleged in the bill. But the bill sets forth that the testator died leaving property in Vermont; that Mr. Bartlett, after he became executor, requested George Prichard, of Bradford, Vermont, to take letters of administration in that state, which was accordingly done; that commissioners were appointed there to receive and adjust the claims of creditors who resided there, and that the plaintiff presented his said claims,

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which were rejected by them; that he appealed from their decision, and in the supreme court of that state recovered judgment for the sum of $5839; that this judgment was by the law of Vermont a merger of his original debt, and an extinguishment of the same; that the suit was defended at the request of Mr. Bartlett; that it was continued in court for a long time; that when judgment was obtained Mr. Bartlett had settled the estate in Massachusetts, but that the trustees held funds which ought to be applied to the payment of debts; that the estate in Vermont was insufficient to pay the debts there, and the plaintiff received only thirty-nine and one tenth per cent. of the amount of his judgment; that he has presented his claim for the balance to said Bartlett, who refuses to pay the same; and he finds that the time for presenting claims against the estate and bringing suits against the executor has expired; and that he had supposed the estate here would be kept open, and also that the estate in Vermont would be sufficient to pay his debt. He therefore seeks to recover the balance of his debt by this suit in equity, out of the funds in the hands of the trustees, notwithstanding the statute of limitations, by which his right of action against an executor is limited to two years.

His position is, that, as his original claim was merged in the judgment obtained in Vermont against the administrator there, the present claim is a new one which has arisen since the decease of the testator; and that there is such a privity between the executor here and the administrator there, that his judgment can be enforced here in equity. Since it is conceded that without that judgment the claim would be barred here by the statute which limits actions against executors to two years, the first question to be considered is, whether the judgment has any validity against the executor.

If we look at the question of privity between the executor here and the ancillary administrator in Vermont, it is difficult to find any valid ground on which such privity can rest. The executor derives his authority from the letters testamentary issued by the probate court here; he gives bond to that court; is accountable to it for all his proceedings; makes his final

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settlement in it, and is discharged by it, in conformity with the statutes of this commonwealth. The administrator derives his authority from the probate court in Vermont, and is accountable to it in the same manner in which the executor is accountable to our court. The authority of the executor does not extend to the property there, nor to the doings of the administrator. Nor does the authority of the administrator extend to the property here, or to the doings of the executor. When the plaintiff commenced his suit against the administrator, the executor had no right to go there and defend it. If he had been found in Vermont he could not have been sued there. The judgment rendered in the suit was not against him, or against the testator's goods in his hands; but was simply against the administrator, and the testator's goods in his hands. The courts of Vermont had no jurisdiction of the executor or of the goods in his hands, any more than our courts would have over the administrator and the goods in his hands. It is this limitation of state jurisdiction that creates a necessity for an administration in every state where a deceased person leaves property; and each state regulates for itself exclusively the manner in which the estate found within its limits shall be settled. If after the payment of debts and expenses in Vermont there had been a surplus remaining in the hands of the administrator, the probate court of that state would have ordered him to pay it over to the executor; and the only way in which the executor and administrator could have any dealings with each other would be under such an order. It is in effect the only way in which they could know each other officially. As there was in fact no surplus, they have nothing to do with each other. They have, therefore, not one of the direct relations to each other which enter into the idea of privity.

But it is said that they are in privity with the testator, and that this creates a privity of estate between them. It is true that the executor is in privity with the testator in respect to the estate which he takes, which is merely the estate in Massachusetts, and within the jurisdiction of its courts; and the administrator is in privity with him in respect to the estate in Vermont,

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which he can administer upon. But as the privity relates to different property and different matters, and is limited to different jurisdictions, it does not aid the plaintiff. There is no privity between the estate in the hands of the executor and that in the hands of the administrator. Each must be administered separately and independently.

Nor is there any need of such a doctrine of privity as the plaintiff contends for. The plaintiff might have prosecuted his original claim here, at the same time that he was prosecuting it in Vermont; so that he was under no necessity to wait till it was barred by our statute of limitations relating to suits against executors and administrators. There would, therefore, be no equity in setting aside the statute of limitations in his favor, even if we had power to do so. On the other hand, it would be very inequitable to permit him to prosecute his suit in another jurisdiction, where the executor could not defend against it, and then, after the estate in Massachusetts had been settled and the time of limitation had expired, revive the liability of the executor because of the foreign judgment thus obtained. Statutes of limitations bind courts of equity as well as courts of law; and in this case the executor not only has a right to its protection, but is bound to avail himself of it.

Another and a decisive objection to the plaintiff's position is, that if it were held to be valid, it would enable the foreign administrator to bind the estate in Massachusetts, by suffering the recovery of a judgment against him.

On a careful examination of the authorities cited, we find nothing in them contradictory to the views here expressed. In *Hill* v. *Tucker*, 13 How. (U. S.) 458, where a testator had by his will appointed executors in different states, it was held that a judgment against the executors in one state was evidence against those in another state on account of the privity between them. But the case was distinguished from that of *Aspden* v. *Nixon*, 4 How. (U. S.) 467. In the latter case the testator was a British subject, and died in Great Britain, leaving property there and in Pennsylvania. The executor obtained letters testamentary in both countries, and it was held that a judgment

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rendered in a suit there was no bar to a suit here between the executor and the heirs and devisees, because the parties and the property were different. In *Stacy* v. *Thrasher*, 6 How. (U. S.) 44, the question of privity was thoroughly discussed by Grier, J., and it was held that an action of debt would not lie against an administrator in one state on a judgment against an administrator of the same intestate in another state, because there was no privity between them. Story Confl. Laws, § 522, is cited as stating the law correctly on this point. In these cases some of the judges dissented, but did not state the reasons for their dissent. In the later case of *McLean* v. *Meek*, 18 How. (U. S.) 16, it was held that a judgment recovered against an administrator in Tennessee was not evidence to support a bill in equity against an administrator in Mississippi. The decision was on the ground that no connection existed or could exist between them, and therefore a recovery against the one was no evidence against the other. Thus the doctrine of the supreme court of the United States appears to be that there is no privity between executors or administrators appointed in different jurisdictions; and the only exception is in the case where executors are ap pointed in different states by the same will.

In Pennsylvania, it has been held that there is no privity between an administrator appointed there and an administrator of the same estate in Barbadoes; and therefore a judgment obtained in Barbadoes would not sustain an action of debt in Pennsylvania. *Brodie* v. *Bickley*, 2 Rawle, 431. No cases of our own are cited which sustain the view of privity that is contended for. On the contrary, so far as they have gone, they are adverse to it. See *Boston* v. *Boylston*, 2 Mass. 384; *Goodwin* v. *Jones*, 3 Mass. 514; *Grout* v. *Chamberlin*, 4 Mass. 611; *Borden* v. *Borden*, 5 Mass. 77; *Langdon* v. *Potter*, 11 Mass. 313; *Talmage* v. *Chapel*, 16 Mass. 71; *Fay* v. *Haven*, 3 Met. 109; *Wheelock* v. *Pierce*, 6 Cush. 288; *Norton* v. *Palmer*, 7 Cush. 523.

The doctrine referred to in behalf of the plaintiff, that a party who has recovered judgment against an executor may, after his decease, bring a *scire facias* upon the judgment against the administrator *de bonis non*, is not in point, because it is founded

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on the fact that both are appointed to administer the same estate. 2 Saund. 72 *r*. But in the present case the administrator was appointed in Vermont, because the executor had no right to administer the estate there.

Another point taken in behalf of the plaintiff is, that his claim is not really against the executor, but against the legatees and their trustees, on the ground that the trustees have received from the executor the assets of the estate, to hold for the legatees; that he has a judgment against the estate which was rendered in a neighboring state since the expiration of the statute time for presenting claims here, and which therefore could not be presented before; and that it thus comes within the provisions of Gen. Sts. *c.* 101, § 31.

It is true that, in the present form of a judgment against the administrator in Vermont, it could not have been presented before. But that circumstance is not material, since it appears that, if it had been rendered and presented at an earlier date, it would not have been valid against the executor. An action against him must still have been upon the original claim. As to him, therefore, the doctrine of merger does not apply. As the judgment in Vermont did not affect him, he could not have pleaded it in bar, even if it had been rendered before an action was brought here. So that it was not a demand that could not have been sued for against the executor, and therefore does not come within Gen. Sts. *c.* 101, § 31. Nor are the legatees or trustees in privity with the administrator. They could not have intervened between him and the executor to recover from him anything that might have remained in his hands after the payment of debts in Vermont; but by the law of comity the amount would have been paid by him under an order of the probate court there to the executor, to be by him administered here. *Dawes* v. *Boylston*, 9 Mass. 337. The judgment in Vermont was in no sense a judgment against them, nor against the property which they had received from the executor.

It is further contended that equity will require legatees to refund to a creditor. In *Noel* v. *Robinson*, 1 Vern. 94, and

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Hodges v. *Waddington*, 2 Vent. 360, this doctrine is stated. But where the liability of legatees is regulated and limited by statute, as it is in this commonwealth, equity will not set aside the statute, but will be governed by it.

Bill dismissed with costs.

Charles Spring *vs.* William P. Baker.*

If citizens of the United States build a vessel in Nova Scotia for themselves, and without consideration execute a builder's certificate to a citizen of Nova Scotia, stating that he is her first purchaser, and he thereupon causes her to be registered there in his name, but never takes possession of her, and afterwards at their request executes a mortgage upon her, with power of sale, to secure advances made to them, and writes upon the mortgage a statement that when she is sold he shall have no claim for any surplus nor be liable for any deficiency, in case she brings more or less than the sum for which she is mortgaged, he retains no attachable interest in her, as mortgagor or otherwise.

Replevin of the brig Afton. At the trial in the superior court, judgment was rendered for the defendant, upon agreed facts which are sufficiently stated in the opinion; and the plaintiff appealed to this court.

L. Child & L. M. Child, for the plaintiff, cited Drake on Attachment, §§ 220, 237, 238, 243; 1 Parsons Mar. Law, 57, 74; 1 Greenl. Ev. § 494; *Bixby* v. *Franklin Ins. Co.* 8 Pick. 86; *Lanfear* v. *Sumner*, 17 Mass. 110; *Colson* v. *Bonzey*, 6 Greenl. 474; *Tinkler* v. *Walpole*, 14 East, 226; *Flower* v. *Young*, 3 Camp. 240.

H. C. Hutchins, for the defendant. The plaintiff had no interest in the vessel except as mortgagee, and, as he made no demand of payment upon his mortgage before suit, he cannot hold her as against the defendant. Rev. Sts. *c.* 90, §§ 78, 75. There is no difference in this respect between a vessel and any other personal property. *Esson* v. *Tarbell*, 9 Cush. 407. The fact that she was built and paid for by others is immaterial. Morrison had the legal title, and she was registered in his name.

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* This case was argued in November 1863.

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The plaintiff's title comes from him; and the plaintiff cannot therefore set up that he had no attachable interest.

Merrick, J. The defendant on the 6th day of June 1859, being a deputy sheriff in the county of Suffolk, attached the brig Afton, then lying at a wharf in Boston, on a writ against John W. Morrison, as his property. And assuming that the plaintiff has no interest in or title to the vessel except that which he acquired under a subsisting mortgage to him from the said Morrison, he thereupon contends that, as no demand of payment was made and no account stated to him of what was justly due on the mortgage before the commencement of this suit, according to the requirements of the statute, this action cannot be maintained. But this assumption is not sustained by the facts to which the parties have agreed.

From their statement, it appears that the Afton was built in the year 1856 at Charlottetown, Prince Edward's Island, by J. A. & S. A. Fowle, and was owned by them; that they were then citizens of the United States, and, wishing to employ the brig in navigation between this country and Nova Scotia, they applied to Morrison, who resided at Charlottetown, and was a citizen of Nova Scotia, to take a builder's certificate of ownership from them, and to cause the brig to be duly registered in the custom-house in his name, but solely to their use and benefit; that he acceded to their request, and the registration was accordingly effected in that manner. To secure the brig to the Messrs. Fowle, he immediately executed a mortgage of her to them. He never exercised nor assumed to exercise any control over the vessel, which was left in their exclusive possession; and they from that time employed her on their own account in the freighting business between Prince Edward's Island and Boston. Afterwards, in July 1858, they wished to obtain a loan on the security of the brig, and, on application therefor to the plaintiff, he consented to furnish it; and it was agreed that a power of sale mortgage should be made to him, and that he should have possession under it, and have the right to take the freight money if he saw fit to avail himself of it. J. A. Fowle explained to him that the mortgage would have to be made by

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Morrison, in whose name the title stood, because that was requisite according to the British revenue laws. A mortgage was then drawn up in Boston, where the brig was lying, and taken to Charlottetown to be executed by Morrison. He there executed the mortgage, and at the same time made and indorsed upon it in writing an agreement that "if the brig is sold, and she shall sell for more than £800 sterling, said Morrison shall make no claim on said Spring for the surplus; and if she shall sell for less than the £800, (which was the sum for which she was mortgaged,) said Spring shall make no claim on said Morrison for the deficiency." The mortgage so prepared, indorsed and executed was delivered to the plaintiff. It evidently was intended to be and was in fact a release and discharge by Morrison of all his title and claim to the vessel; and after that time, and until she was attached by the defendant, he never set up any claim, and no one treated him as having any, to the brig. About the time when the mortgage deed was delivered to Spring, he went on board the brig with Fowle. In the conversation which they then had, Fowle said the power of sale mortgage conveyed to him absolutely all the title which the Messrs. Fowle had to the brig; and he considered that he then made a full delivery of her to the plaintiff, to which the latter assented. Under these circumstances of a loan and an advance upon the vessel made directly to them, and the taking of formal possession of her as security, the vessel must be considered as having been pledged by them as security for the payment to the plaintiff of the amount which he advanced upon her. After he had thus taken possession, he again went on board of her, and told Capt. Atwater, the master, what had taken place, and informed him that he had taken possession of the brig, and that she would thenceforward be run on his account; but that, until further directions given, the reports of her voyages and earnings might be made to the Messrs. Fowle. She continued to be run under this arrangement and direction until the attachment was made by the defendant.

It is therefore apparent that Morrison, never having had more than a mere nominal right to the brig, or at most only an interest

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in trust for the Messrs. Fowle, relinquished at their request all his claim to her by his mortgage and the indorsement upon it to the plaintiff. By taking possession of the brig under a delivery from the Messrs. Fowle as security for a loan made directly to them, the plaintiff became a pledgee of the vessel, deriving his title thereto from them. Morrison no longer retained any interest of which he or any of his creditors could avail themselves. What were the rights or liabilities of any of the parties in respect to penalties or forfeitures to the government, or what could have been done with the brig, in consequence of her registration continuing to stand in the custom-house in Prince Edward's Island in the name of Morrison, need not now be considered. The question here to be determined is, whether Morrison is to be regarded as standing in the relation of mortgagor to the plaintiff, so that the action of replevin cannot be maintained without a previous statement to the defendant of the amount due from Morrison on the mortgage. As no debt is or ever was justly due from him to the plaintiff, and as he authorized the brig to be absolutely disposed of without any accountability to him, there could be no necessity or occasion for making a statement, in compliance with the provisions of the statute, of the amount due to the plaintiff, for security for the payment of which the vessel stood pledged to him.

Judgment must therefore be entered for the plaintiff.

HIRAM E. WOOSTER & others *vs.* WILLIAM TARR & another.

The shipper named in a bill of lading is liable to the carrier for the freight, although he does not own the goods, and the carrier has waived his lien thereon.

CONTRACT to recover for the carriage of mackerel from Halifax to Boston.

It was agreed in the superior court that the defendants shipped the mackerel at Halifax, upon a vessel of which the

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plaintiffs were part owners, said Wooster being master, under a bill of lading in the usual form, to be delivered at Boston "unto Messrs. R. A. Howes & Co. or to their assigns, he or they paying freight for said goods," &c. On the arrival of the vessel at Boston, Wooster was informed by Howes & Co. that the mackerel had been sold "to arrive," to a person to whom they requested him to deliver them. The mackerel were accordingly delivered, and payment demanded of Howes & Co., but refused. Howes & Co. were then and still are insolvent. The mackerel, at the time of their delivery on board the vessel, had been purchased and paid for by the defendants for and on account of Howes & Co., at whose risk they were after shipment; but this fact was unknown to the plaintiffs. The mackerel were entered at the custom-house in Halifax in the name of the defendants.

Upon these facts judgment was rendered for the plaintiffs, and the defendants appealed to this court.

T. H. Russell, for the defendants.

H. C. Hutchins, for the plaintiffs.

Bigelow, C. J. The question raised in this case is very fully discussed in *Blanchard* v. *Page*, 8 Gray, 281, 286, 290–295. It is there stated to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and the ship-owner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed. Of the correctness of this statement there can be no doubt. The shipper or consignor, whether the owner of the goods shipped or not, is the party with whom the owner or master enters into the contract of affreightment. It is he that makes the bailment of the goods to be carried, and, as the bailor, he is liable for the compensation to be paid therefor. The *dictum* of Bayley, J., in *Moorsom* v. *Kymer*, 2 M. & S. 318, subsequently repeated by Lord Tenterden in *Drew* v. *Bird*, Mood. & Malk. 156, that in the absence of an express contract by the shipper to pay freight, when the goods are by the bill of lading to be delivered on payment of freight by the consignee, no recourse can be had for the price of the carriage to the shipper, has been distinctly repudiated, and cannot be regarded as a correct statement of

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the law. *Sanders* v. *Van Zeller*, 4 Q. B. 260, 284. Maclachlan on Shipping, 426.

It is contended, on the part of the defendants, that the omission of the master to collect the freight of the consignees of the cargo or their assigns, under the circumstances stated, was a breach of good faith towards the shippers, which operates as an estoppel on him and the other owners of the vessel, whose agent he was, to demand the freight money of the defendants. But there are no facts on which to found an allegation of bad faith against the master. He did no act contrary to his contract or inconsistent with his duty towards the shippers. It is true that he omitted to enforce his lien on the cargo for the freight, by delivering it without insisting on payment thereof by the consignees. This was no violation of any obligation which he had assumed towards the defendants as shippers of the cargo. A master is not bound at his peril to enforce payment of freight from the consignees. The usual clause in bills of lading, that the cargo is to be delivered to the person named or his assignees, "he or they paying freight," is only inserted as a recognition or assertion of the right of the master to retain the goods carried until his lien is satisfied by payment of the freight, but it imposes no obligation on him to insist on payment before delivery of the cargo. If he sees fit to waive his right of lien and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains. *Shepard* v. *De Bernales*, 13 East, 565. *Domett* v. *Beckford*, 5 B. & Ad. 521, 525. *Christy* v. *Row*, 1 Taunt. 300. Although the receipt of the cargo under a bill of lading in the usual form is evidence from which a contract to pay the freight money to the master or owner may be inferred, this is only a cumulative or additional remedy, which does not take away or impair the right to resort to the shipper on the original contract of bailment for the compensation due for the carriage of the goods.

Judgment for the plaintiffs.

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JAMES E. BARNARD *vs.* EMERY N. MOORE & another & trustee.

A mortgage of personal property given to secure such sums as may thereafter become due to the mortgagee is not a valid security, as against a judgment creditor of the mortgagor, for claims accruing after the property was attached in his suit, and the mortgagee summoned as trustee.

TRUSTEE PROCESS. It was agreed in this court that, at the time of the service of the writ upon the supposed trustee, he held a mortgage upon the property which was attached upon the writ, to secure a certain existing claim and also all such sums as might become due to him from the mortgagor; and the only question was, whether the trustee could avail himself of this mortgage to secure certain sums which became due to him from the mortgagor after the making of the attachment and the service upon the trustee. The interrogatories to the trustee and his answers were relied on to show when he had notice of the attachment.

D. E. Ware, for the plaintiff. The mortgage could be a valid security for claims accruing after the attachment, only in case the mortgagee had no notice of the attachment. *Adams* v. *Wheeler*, 10 Pick. 199. *Brinkerhoff* v. *Marvin*, 5 Johns. Ch. 327. *Lansing* v. *Woodworth*, 1 Sandf. Ch. 43. *Barry* v. *Merchants' Exchange Co.* Ib. 314. *Seymour* v. *Darrow*, 31 Verm. 122. *Rolt* v. *Hopkinson*, 25 Beav. 461. The service of the writ was sufficient notice. *Adams* v. *Wheeler*, 10 Pick. 199. *Jones* v. *Smith*, 1 Hare, 55.

N. B. Bryant, for the trustee. A mortgage for future liabilities is good, and the mortgagee's interest in the property is not affected by an attachment. *Granger* v. *Kellogg*, 3 Gray, 490. *Codman* v. *Freeman*, 3 Cush. 311. *Haskell* v. *Gordon*, 3 Met. 272. The plaintiff is in the position of a purchaser with notice, and should be held to pay all that will become due under the mortgage. *Curtis* v. *Mundy*, 3 Met. 407. *Bates* v. *Norcross*, 14 Pick. 231. *Shaw* v. *Poor*, 6 Pick. 86. His attachment was only a lien, and subject to all prior incumbrances. By means of it he can stand in no better position than the mortgagor.

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Hubbard v. *Hamilton Bank*, 7 Met. 345. *Forbes* v. *Parker*, 16 Pick. 462. *Ayer* v. *Bartlett*, 9 Pick. 156. The trustee had no notice that he was summoned as trustee by reason of his holding the mortgage, until some time after the making of the attachment.

Dewey, J. A mortgage may be valid, having a stipulation in it for securing future advances and liabilities on the part of the mortgagee. If such advances have been made or liabilities assumed before other interests have legally intervened, they will be secured by the mortgage. But after a creditor has attached the debtor's interest in the property mortgaged, and the mortgagee has been duly summoned as trustee of the mortgagor, no new and independent indebtment, either by moneys advanced, services rendered or liabilities assumed, will defeat the lien by attachment, or have a priority to the same under the mortgage. It is said, on the part of the trustee, that he had no sufficient notice that he was summoned as trustee by reason of his relation to this property as mortgagee, until the filing of interrogatories pending his examination as trustee, and therefore that he is not to be limited in his security, by force of the mortgage, to demands and liabilities that had been created prior to the service of the trustee process upon him. But we think this position not tenable. The case of *Hobart* v. *Jouvett*, 6 Cush. 105, is strongly to the point that where the mortgaged property is actually attached and taken, and the mortgagee summoned as trustee, he is legally notified of the claim of the attaching creditor upon the mortgaged property, and he cannot afterwards change the state of the same by new debts and liabilities, to the prejudice of the attaching creditor. In that case it was held that, after being thus summoned as trustee, he could not legally give the notice and proceed to foreclose the mortgage, to the prejudice of the attaching creditor. If so, it would seem to be quite clear that he could not add a new and distinct indebtedness for services rendered subsequently to the attachment, and in matters wholly arising after the attachment.

In the opinion of the court, the trustee cannot hold the property as security for claims accruing after said attachment and service on him.

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Joshua D. Ball *vs.* Elizabeth J. Wyeth.

An agreement by a creditor to extend the right to redeem land which is mortgaged to him to secure his debt, and not to foreclose the mortgage for a specified time, does not extend the personal liability of his debtor beyond the time at which it would otherwise cease by the statute of limitations.

If a lease of buildings contains a written clause providing that they "are to be kept in repair and maintained in good condition by the lessee," and printed clauses providing that at the end of the term the lessee will quit and deliver up the premises "in as good order and condition, (reasonable use and wearing thereof, fire and other unavoidable casualties, excepted,) as the same now are or may be put into" by the lessor, and that the lessee shall keep the buildings insured against loss by fire, in a specified sum payable to the lessor, the lessee is not liable to repair injuries which occur through ordinary wear, or fire or other unavoidable casualties.

Contract brought on the 18th of December 1862 by the administrator of the estate within this commonwealth of Leonard Jarvis, against the executrix of the estate of Nathaniel J. Wyeth, to recover the sum of $15,000, and interest, for money advanced by the plaintiff's intestate to the defendant's testator, and also to recover upon the covenants of a lease.

At the trial in this court, before the chief justice, it appeared that on the 20th of August 1851 Leonard Jarvis, of Baltimore, for the accommodation of Nathaniel J. Wyeth, opened a continuous credit for six thousand pounds sterling with George Peabody of London, which Wyeth used to the full amount thereof, having given to Jarvis a mortgage on certain parcels of real estate for security. Subsequently, on the 17th of August 1852, a new arrangement was made between Jarvis, Wyeth, and another person who was interested in the matter with Wyeth, by which the latter, to furnish security for his portion of the sum received under the letter of credit, executed to Jarvis a deed of the "Assabet Estate," absolute in form, for the consideration of fifteen thousand dollars. This estate consisted of land in Sudbury, with an ice-house thereon, and machinery and apparatus for cutting, transporting and storing ice. On the same day, Jarvis and Wyeth executed an indenture, by which Jarvis leased the same property to Wyeth for three years, for the rent of nine hundred dollars a year, payable semi-annually

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Certain provisions of this indenture are recited in the opinion. On the same day, Jarvis and Wyeth executed another indenture, reciting the above deed and lease, and providing that the same were made on condition that, if Wyeth should observe the covenants of the lease, Jarvis should convey to him the said property at any time within three years, upon payment of fifteen thousand dollars, and that if Wyeth should fail to observe the said covenants, or to pay the said sum within the specified time, Jarvis should have the right to sell the property, upon terms and conditions similar to those usually incorporated into a mortgage with power of sale. Subsequently the lease was extended, by a written memorandum upon the back of it, until January 1st 1862, and the following agreement (marked "M") was executed by Jarvis upon the other indenture, on the 13th of November 1854:

"The lease mentioned in this agreement having been, by memorandum upon the back of the lease, extended to seven years after the 1st of January 1855, the said Leonard Jarvis agrees also to extend the right to redeem the land herein mentioned, upon the payment of the sum of fifteen thousand dollars at any time within said term of seven years, and not to foreclose within said term."

Jarvis died in 1855, and on the 12th of August 1862 the plaintiff was appointed administrator of his estate within this commonwealth. Wyeth died in 1856, and the defendant was appointed executrix of his estate on the 14th of October in that year, and gave bond and notice of her appointment according to law. She has received the rents of the Assabet Estate since Wyeth's death, and paid to the plaintiff the semi-annual payments provided for in the lease, to April 15th 1859.

Upon the foregoing facts, the chief justice directed a verdict for the plaintiff for $15,000, and interest thereon from April 15th 1859, and reported the case for the determination of the whole court. And it was provided that if the court should be of opinion that said sum was not a debt due from Wyeth's estate, or that the same was barred by the statute of limitations, then the verdict should be set aside, and the case stand for trial upon the

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other counts in the declaration, under such instructions as the court should give.

H. W. Paine & C. Smith, for the defendant.

E. O. Hinkley (of Maryland) *& J. D. Ball*, for the plaintiff.

Hoar, J. Much learning and labor have been expended by counsel in the argument of this cause, upon the question whether, when the plaintiff's intestate furnished the defendant's testator with a letter of credit, and afterward paid the sum of $15,000 to protect it, taking a mortgage security therefor, the effect of the whole contract was that he should rely exclusively upon the mortgage for his indemnity; or whether the defendant's testator incurred beside a personal liability for the amount advanced, upon which this action could be maintained. We have not found it necessary to come to any conclusion upon this point; because, assuming that the plaintiff's view of it is the right one, we are all of opinion that any claim upon it is barred by the statute of limitations.

The defendant's testator died in 1856, and the defendant was appointed executrix and gave bond on the 14th of October 1856; and it is agreed that due notice was given of her having been qualified as executrix. If, then, the mortgage were not a substitute for the personal obligation, still the debt was contracted in 1852. No rent or interest has been paid since 1859; and the only evidence to show that the cause of action accrued within a period which would avoid the bar of the statute of limitations is the agreement marked "M". At the time when that agreement was made, November 13th 1854, according to the theory of the plaintiff, Mr. Wyeth owed Mr. Jarvis $15,000; Mr. Jarvis had a conveyance in the nature of a mortgage to secure the payment of that sum; and had leased the mortgaged premises to Mr. Wyeth, at a rent equal to the interest on the debt, for a term which would have expired on the 15th of October 1855, but had been extended until January 1st 1862. We can find in the paper marked "M" nothing which would in legal effect modify or change the personal obligation of a debtor to pay money. The mortgage and the evidence of debt are usually separate instruments, and afford to the mortgagee

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independent and concurrent remedies. The mortgage may be wholly discharged or released without affecting the personal liability of the mortgagor; and the statute of limitations, or a discharge in bankruptcy or insolvency, which terminate the personal liability, will not operate to extinguish the mortgage security. The creditor, by this paper, merely agreed to modify his right to avail himself of his security by sale or foreclosure. It in terms only applies to his rights under the mortgage, and we cannot extend it to create any further liability of the debtor. The right to sue the defendant was therefore barred in two years from the time of notice given of her appointment.

This decision disposes of the principal question in the case; and the remaining one relates only to the liability of the defendant upon the covenants in the lease. The right of the plaintiff to recover the rent from October 15th 1861 to January 1st 1862, which became due within a year before the commencement of this action, is conceded. Gen. Sts. *c.* 97, § 9. But the plaintiff claims in addition that he can recover on the covenant in the lease to keep the premises in repair.

In one clause of the lease it is provided that "all the buildings, machinery, fixtures and apparatus are to be kept in repair and maintained in good condition by the said lessee." In another clause the lessee covenants that he will quit and deliver up the premises at the end of the term, "in as good order and condition, (reasonable use and wearing thereof, fire and other unavoidable casualties, excepted,) as the same now are or may be put into by the said lessor." In a third clause the lessee covenants to keep the buildings insured against loss by fire in the sum of five thousand dollars, payable to the lessor in case of loss. The clause first recited is inserted in writing, while the others were contained in the printed form of lease which was used by the parties. And where clauses in an instrument are inconsistent, it is the usual rule of construction that such as are written will control those that are printed, on the presumption that the latter were left by inadvertence. But if they can all be retained and interpreted together, none are to be rejected.

To support the plaintiff's construction, the limitation in the

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second clause, which excepts reasonable use and wear, fire and other unavoidable casualties, must be rejected as wholly without force or application; and the lessee is to be held, in case of the destruction of the property by fire, to replace it, although he is also to keep it insured at his own expense, for the benefit of the lessor.

We think the more just conclusion is that the exception was intended to qualify both of the covenants, to repair and to deliver up the premises; and that the object of the written clause was to stipulate that the lessee should do his own repairs, and not call upon the lessor to keep the estate in tenantable condition.

It will follow that the plaintiff can only recover for a failure to keep the property in repair, so far as it is caused by something else than ordinary wear and unavoidable casualties; and, according to the reservation in the report, the verdict must be set aside, and the case stand for trial under rulings in conformity with the foregoing opinion.

Dedham and West Roxbury Railroad Company *vs.* Metropolitan Railroad Company.

The authority conferred on the West Roxbury Railroad Company by *St.* 1856, *c.* 201, to construct and maintain a railway over certain streets in West Roxbury was not revoked or repealed by *St.* 1858, *c.* 88, § 10.

Bill in equity praying for an injunction to restrain the defendants from building a street railway over a portion of Shawmut Avenue in West Roxbury, lying between the junction of said avenue with the Boston and Providence Railroad and the line separating West Roxbury from Roxbury.

At the hearing, it appeared that the plaintiffs were incorporated by *St.* 1861, *c.* 135, and that both they and the defendants claim the right to build a street railway over that part of

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Shawmut Avenue above described. The West Roxbury Railroad Company was incorporated by *St.* 1856, *c.* 201, and at that time Shawmut Avenue was a turnpike, owned by a turnpike corporation, and was afterwards in 1857 laid out as a county road. Two agreements in writing between the West Roxbury Railroad Company and the Metropolitan Railroad Company, one dated September 3, 1857, and the other October 29, 1857, were put in evidence, and are sufficiently referred to in the opinion. On the 29th of August 1862, in pursuance of *St.* 1858, *c.* 38, § 9, the West Roxbury Railroad Company conveyed to the defendants all its real estate, railroad location, tracks, franchise, property and rights; and since then has had no separate organization as a corporation, but has become merged in the defendants. The selectmen of West Roxbury have granted to the defendants a location in that town over Shawmut Avenue.

Upon these facts, and the several statutes relating to the subject matter, the case was reserved by the chief justice for the determination of the whole court.

J. W. Rollins, for the plaintiffs.

S. Bartlett & L. Shaw, for the defendants.

Bigelow, C. J. We are of opinion that the power and authority conferred on the West Roxbury Railroad Company by their original charter, *St.* 1856, *c.* 201, to construct and maintain a railway over such streets in the town of West Roxbury as should from time to time be fixed and determined by a vote of the selectmen of said town, was not revoked or repealed by the subsequent provision in *St.* 1858, *c.* 38, § 10. Such repeal or revocation was clearly not intended by the legislature. Looking at the previous legislation in relation to the right of the West Roxbury Railroad Company to connect its tracks with those of the Metropolitan Railroad Company, the purpose of the revoking or repealing clause in *St.* 1858, *c.* 38, will be made manifest. Originally the former company, under the provisions of its charter above cited, had only the power to unite with the latter company "at such points as might be agreed in writing between them, on the line separating the town of West Roxbury from the city of Roxbury." But by *St.* 1857, *c.* 230, this power was

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greatly enlarged. The West Roxbury Railroad Company was thereby authorized to extend its tracks into the city of Roxbury, and also into the city of Boston, over certain designated streets, and to connect its tracks in said streets at any point with those of the Metropolitan Railroad Company, and was also authorized to run its cars over the road of the last named company on certain conditions. The power thus granted to the West Roxbury Railroad Company was an absolute one, the exercise of which did not in any way depend on the assent of the Metropolitan Railroad Company. Such being the legal relation existing between these two corporations, they entered into negotiations with each other for the purpose of adjusting their conflicting interests and providing for a mode of connecting their respective roads by an amicable arrangement, instead of resorting to their legal rights under the statutes above cited. These negotiations resulted in agreements bearing date September 3d 1857 and October 29th 1857, by which, among other things, the location of the tracks of the West Roxbury Railroad Company in the streets of the city of Roxbury was definitely fixed and determined, and their point of connection with those of the Metropolitan Railroad Company was established; and all right of the former company to construct tracks elsewhere in said city of Roxbury or in the city of Boston, or to connect at other points or in a different mode with the latter company, were expressly released and surrendered. It was also stipulated by these agreements, that "both companies shall take all proper steps to get the contract ratified by the next legislature at the next session thereof, and also to get the charter of the West Roxbury Railroad Company so amended as not to allow them to build any further out of West Roxbury than herein indicated." It was after agreements containing these stipulations were executed, and to carry out the provisions contained in them, that *St.* 1858, *c.* 38, was passed, and by § 9 of that act it was enacted that said agreements "are hereby confirmed and assented to, and they may be carried into effect by said companies accordingly."

Viewed in the light of this statement of the previous legislation

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in relation to the subject matter, and of the negotiations and agreements between the two corporations, the purpose of the repealing clause in *St.* 1858, *c.* 38, § 10, is free from all doubt. It was only designed to carry out and make effectual the stipulations of the two companies concerning the location of the West Roxbury Railroad in the city of Roxbury, and its connection with the Metropolitan Railroad Company in said city. It took away the authority given by *St.* 1857, *c.* 230, to the former corporation to build its road or connect its tracks with those of the latter at any place in the city of Roxbury other than those agreed on between the parties, and also annulled the power given to the West Roxbury Railroad Company to construct its road in the limits of the city of Boston; but beyond this the provision did not go. It annulled the authority to compel the Metropolitan Railroad Company to unite its tracks at such points in Roxbury or Boston as the West Roxbury Railroad Company might select in the streets designated. But it did not in terms or by implication take away the power conferred on the latter company by its original charter to construct a road in any street in the town of West Roxbury which it might with the assent of the selectmen determine upon, nor did it revoke the authority thereby conferred to connect the tracks of the two roads at such point on the line separating said town from the city of Roxbury as the two corporations might mutually fix and agree upon, in conformity with the provision contained in *St.* 1856, *c.* 201, § 1. These powers were left entirely untouched by the repealing clause contained in *St.* 1858, *c.* 38, § 10.

If there was any room for doubt as to the construction of this repealing clause in the latter statute, it is made entirely clear by the second section of the act incorporating the plaintiffs, *St.* 1861, *c.* 135, which clearly recognizes an existing authority in the West Roxbury Railroad Company to construct tracks in the town of West Roxbury over the streets named in the plaintiff's bill, and to form a connection with the Metropolitan Railroad Company at a point different from that specified in the *St.* 1858, *c.* 38, § 1. This recognition is wholly inconsistent with the construction, for which the plaintiffs contend, of the

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repealing clause in St. 1858, c. 38, § 10. Nor can this provision in the plaintiffs' charter be properly construed as a new and special grant of power. On the contrary, it assumes the existence of the power, and is in the nature of a declaratory statute, defining and making clear the meaning of a prior enactment, and confirming a right which had been previously conferred. To us it seems clear that the plaintiffs, in asking for the interference of the court to restrain the defendants from constructing a road over the streets designated in their bill, are in effect seeking to set aside the manifest intention of the legislature, as incorporated into the provisions of their own charter.

Bill dismissed.

WILLIAM F. WHITE *vs.* JOSHUA W. CLAPP.

If a writ which is brought upon a just claim is served by leaving a summons at the debtor's last and usual place of abode, and he, though knowing of the commencement of the action, never receives the summons, and afterwards commences proceedings in insolvency, and does not appear to defend or procure a continuance of the action, he cannot thereafter maintain an *audita querela* to set aside a judgment rendered against him therein.

An appeal lies from the decision of a judge of the superior court upon agreed facts on an *audita querela*.

AUDITA QUERELA to annul a judgment recovered by the defendant against the plaintiff. The following facts were agreed in the superior court:

On the 24th of April 1861 the defendant commenced an action against the plaintiff in the police court of Boston to recover the amount of a promissory note for $190.86, which was then due from the plaintiff to the defendant, and an attachment was made of the plaintiff's property, of which he knew, and which was dissolved by his commencing proceedings in insolvency on the 27th of the same April. The writ was served by leaving a summons at the last and usual place of abode of the plaintiff, but he never received it, and had no notice of the service of it except such as the law implies. He did not appear in the

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action, and judgment was rendered against him on the 7th of May 1861. On the 3d of the following December he obtained his discharge. In January 1863 the defendant commenced an action against the plaintiff upon the judgment, which gave the first notice to the plaintiff of the recovery of the judgment. This writ of *audita querela* was thereupon brought.

Upon these facts, *Putnam*, J. ruled that the *audita querela* would lie; and the defendant appealed to this court.

J. W. Rollins, for the defendant, cited *Dingman* v. *Myers*, 13 Gray, 1; *Stone* v. *Chamberlain*, 7 Gray, 206; *Faxon* v. *Baxter*, 11 Cush. 35; *Foster* v. *Plummer*, 3 Cush. 381; *Coffin* v. *Ewer*, 5 Met. 228; *Brackett* v. *Winslow*, 17 Mass. 153; *Wetherell* v. *Goss*, 26 Verm. 748; *Eastman* v. *Waterman*, Ib. 502; *Barrett* v. *Vaughan*, 6 Verm. 243; *Stone* v. *Seaver*, 5 Verm. 549; *Dodge* v. *Hubbell*, 1 Verm. 491; *Little* v. *Cook*, 1 Aikens, 363; *Ames* v. *Winsor*, 19 Pick. 247; *Barker* v. *Haskell*, 9 Cush. 218.

G. E. Betton, for the plaintiff, in addition to some of the cases cited for the defendant, cited *Tyler* v. *Lathrop*, 5 Verm. 172; *Starbird* v. *Moore*, 21 Verm. 533.

Dewey, J. The plaintiff has shown no case for sustaining an *audita querela*. The facts stated show that he had knowledge of the service of the writ against him by an attachment, and of course he must have had notice of the existence of the suit, although he might not have known the precise day when it was returnable. But, what is of more importance, the service as to himself was duly made by leaving a summons at his last and usual place of abode. This the statute declares to be a legal and effectual notice. Further, the plaintiff was justly indebted to the defendant in the sum for which judgment was taken. Although in fact the summons did not come to his hands, yet that would furnish no sufficient ground for a stay of execution or the granting of a review, unless some defence existed to the demand.

The fact that the plaintiff had become a subject of proceedings in insolvency, pending the action, constituted no defence to the action. It might have been a ground for a motion to continue the case, but such an order was a discretionary

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matter with the judge, and not a matter of legal right with the plaintiff.

But if an insolvent debtor neglects to take the necessary steps in court to postpone the action, and subsequently a discharge is granted after judgment has been rendered, the party has no remedy by *audita querela*. *Faxon* v. *Baxter*, 11 Cush. 35. This case presents no element of fraud or improper proceedings on the part of the defendant, nor any legal defence to the former action of which the plaintiff has been deprived. Under these circumstances, no ground exists for maintaining the present action.

As to the right of appeal to this court, we think that the statement of facts agreed to by the parties in the superior court was intended to present the question of law, whether, upon the facts stated, this process would lie, and whether any case was shown for sustaining an *audita querela* and setting aside the former judgment; and the appeal was properly taken.

Plaintiff nonsuit.

Holmes Ammidown *vs.* The President, Directors and Company of the Granite Bank.

A deed of a certain described lot of land, with a store thereon, "together with all the rights, easements, privileges and appurtenances thereto belonging, and now had and enjoyed therewith; being the same premises which A. B. conveyed to me," does not include a lot of land in the rear of the described premises, which was not conveyed by A. B. to the grantor, although the grantor owns the same and has built thereon a store connected with the store on the described premises by a covered bridge, and has agreed with the owners of adjoining lots that such rear store shall not be rented or occupied by any person except the owner or occupants of the front store, as an appendage to the same, and that no building shall ever be erected upon such rear lot except of a specified height.

Writ of entry to recover a parcel of land with a building thereon, situated in the rear of a certain store on Milk Street in Boston. The following facts were agreed in this court:

On the 5th of August 1842, Henry M. Holbrook, under whom both parties claimed title to the demanded premises, received a

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deed of a lot of land on Milk Street, with a store thereon, from Edmund Dwight, James K. Mills and Charles H. Mills, and on the same day mortgaged the same to the Massachusetts Hospital Life Insurance Company to secure a certain sum. On the 18th of September 1845, Holbrook received a deed of a lot of land in the rear of several lots fronting upon Milk Street, including the demanded premises, from Lucius M. Sargent; and afterwards conveyed portions thereof to Abbott Lawrence and to Chace & Grew, retaining the demanded premises, being the portion in the rear of his lot upon Milk Street. On the 8th of April 1846, Holbrook, Lawrence, Chace & Grew and others executed an indenture, which recited that they were the owners of a block of six stone stores on Milk Street, extending easterly from the corner of Pearl Street, and contained the following provisions:

"Now be it known that we do hereby mutually grant, covenant and agree, each of us severally, for himself and his respective heirs and assigns, to and with the other of the parties hereto, their heirs and assigns, jointly and severally, in manner following, that is to say: the several yards in the rear of said stores, respectively, extending back from said stores about fifteen feet, shall be forever kept open, as they now are and have been since the erection of said stores, for the common use and benefit of the parties hereto, their respective heirs and assigns; and each of the parties hereto, their respective heirs and assigns, shall forever have, hold and enjoy the right to pass and repass through and over the said yards lying between his particular store and Pearl Street, and to convey any and all goods to and from his said particular estate to and from said Pearl Street; and neither of the parties, his heirs and assigns, shall at any time hereafter build upon the said land heretofore used as a passage way in the rear of their respective stores, nor incumber the same in any way with coal, boxes or any other article, any further than may be necessary in receiving and delivering goods, and hoisting and lowering the same into and out of their several stores; it being the meaning and intention of the parties hereto that no one of them, his heirs and assigns, shall ever erect any building in or upon their respective yards aforesaid, but that the

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said land, so used as a passage way in the rear of their respective stores, shall always be kept open and unincumbered, for the benefit of light and air to the estates of all the parties, as well as for the purpose of passing and repassing as aforesaid. And the said Holbrook, Lawrence, Chace & Grew, their respective heirs and assigns, shall have and enjoy the privileges hereby granted for the benefit and accommodation of their respective estates, on the southerly side of their respective yards aforesaid, in the same manner and to the same extent they are herein granted for the benefit and accommodation of their several estates fronting on Milk Street. Provided, however, that nothing herein contained shall preclude the said Lawrence, Holbrook and Chace & Grew, from building covered bridges from their respective stores aforesaid to the stores about to be erected by them on their respective estates in the rear of their respective yards aforesaid; said bridges to be built, commencing and running from the first floor above the cellars of the stores, in Milk Street, of said Lawrence, Holbrook and Chace & Grew, and not to exceed in height twenty-four feet from the pavement running to the corresponding stories of the stores now being built in the rear. And it is mutually agreed and covenanted that neither of said back stores shall be rented or occupied by any person or persons except the owner or occupants of the above-mentioned stores on Milk Street, as appendages to the same. And, in consideration of these last grants, the said Holbrook, Lawrence and Chace & Grew severally covenant with each of the other parties hereto that no building shall ever be erected on their respective rear lots aforesaid, the height of which shall exceed thirty-six feet six inches from the said yard to the eaves, and that the pitch of roof of said buildings respectively shall not exceed nine inches to the foot."

In 1846, Holbrook, Lawrence, and Chace & Grew erected buildings on their rear lots, leaving a passage twenty-one feet and three inches wide between the front and rear buildings, and connecting said buildings by a covered bridge, according to the provisions of the indenture. On the 10th of July 1854, Holbrook executed to George R. Sampson a mortgage of "all that lot

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of land in said Boston, with the new store thereon, bounded northwesterly by Milk Street, on two lines, six feet ten inches, and nineteen feet five inches; southwesterly on land and store now or late of Almy, Blake & Patterson, eighty-five feet and seven inches; southeasterly on land late of Lucius M. Sargent, in part, and in part on land now or late of Edward Clarke and others, thirty-one feet five inches; and northeasterly by land and store now or late of Edward Clarke and E. L. Penniman, eighty-seven feet three inches, or however otherwise bounded or described; together with all the rights, easements, privileges and appurtenances thereto belonging, and now had and used and enjoyed therewith; being the same premises which Messrs. Edmund Dwight, James K. Mills and Charles H. Mills conveyed to me by deed dated Aug. 5, 1842, recorded," &c. On the 10th of September 1855, Sampson assigned this mortgage to the tenants, who in the next month entered the premises for foreclosure, for breach of condition. On the 12th of January 1856, the Massachusetts Hospital Life Insurance Company assigned their mortgage to the tenants, who in the following March entered the premises for foreclosure for breach of condition, since when they have been in possession thereof, and of the demanded premises. On the 13th of September 1855, Holbrook conveyed the demanded premises to the demandant.

The building on the demanded premises has always been leased with and as a part of the store on Milk Street, and has always been used and occupied therewith. The whole has always been leased together for one sum. The only mode of access to the building standing on the demanded premises is through the passage established by the indenture, opening upon Pearl Street, and by the bridge from the front store.

J. G. Abbott, for the demandant, cited *Doane* v. *Broad Street Association*, 6 Mass. 332; *Grant* v. *Chase*, 17 Mass. 443; *Plymouth* v. *Carver*, 16 Pick. 183; *Hurd* v. *Curtis*, 19 Pick. 459; *Johnson* v. *Jordan*, 2 Met. 234; *Parish* v. *Whitney*, 3 Gray, 516.

H. C. Hutchins, for the tenants. The rule that land cannot pass as appurtenant to land is not an invariable one; and the

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later cases have firmly established the doctrine that it is a question of intention. 2 Washburn on Real Prop. 627, and cases cited. *Hill* v. *West*, 4 Yeates, 142. *United States* v. *Harris*, 1 Sumner, 21. *Buck* v. *Nurton*, 1 B. & P. 57. *Jackson* v. *White*, 8 Johns. 59. *Gibson* v. *Brockway*, 8 N. H. 465. *New Ipswich Factory* v. *Batchelder*, 3 N. H. 190. *Otis* v. *Smith*, 9 Pick. 293. *Salisbury* v. *Andrews*, 19 Pick. 250. *Cook* v. *Farrington*, 10 Gray, 70. *Simpson* v. *Dendy*, 8 C. B. (N. S.) 433. 4 Cruise Dig. (Greenl. ed.) tit. xxxii. c. 21, § 30. It is manifest that Holbrook intended to include the demanded premises in the mortgage, because, 1. They were then actually used and enjoyed with the front store. 2. Under the indenture, the rear store could only be rented and occupied by the occupant of the front store, and it was expressly made an appendage to the front store. 3. If severed from the front store, the demanded premises would be wholly inaccessible. No right to use the passage was reserved, unless the rear store should be occupied with the front store. 4. The tenants took, with the front store, the sole right to use the covered bridge, which extends about six feet over the demanded premises.

Chapman, J. The demandant claims title under a deed from Henry M. Holbrook, who owned the land, unless he had conveyed it to the grantors of the tenants. If he had thus conveyed it, he had done so by a deed of mortgage to George R. Sampson, dated July 10, 1854, which mortgage was assigned to the tenants, and foreclosed by them. The case, therefore, depends upon the construction which shall be given to the mortgage. The land therein described is, "all that lot of land in said Boston, with the new store thereon, bounded northwesterly by Milk Street, on two lines, six feet ten inches, and nineteen feet five inches; southwesterly on land and store now or late of Almy, Blake & Patterson, eighty-five feet and seven inches; southeasterly on land late of Lucius M. Sargent, in part, and in part on land now or late of Edward Clarke and others, thirty-one feet five inches; and northeasterly by land and store now or late of Edward Clarke and E. L. Penniman, eighty-seven feet three inches, or however otherwise bounded or described."

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Thus far the description refers to adjoining lots as the boundaries of the lot conveyed; but guards against mistakes that may thus be made in the description of the lot conveyed, by the phrase, "or however otherwise bounded or described." The description proceeds, "together with all the rights, easements, privileges and appurtenances thereto belonging, and now had and used and enjoyed therewith; being the same premises which Messrs. Edmund Dwight, James K. Mills and Charles H. Mills conveyed to me by deed dated Aug. 5, 1842, recorded," &c.

The last clause excludes the demanded premises; for it is conceded that the deed of Dwight and others did not include them. If therefore they passed by the mortgage, it must be under the clause granting all the "rights, easements, privileges and appurtenances thereto belonging, and now had and used and enjoyed therewith." The question arising in this case is, whether the premises were conveyed by these words. All these words have a well defined legal signification. The word "rights," as applied to property, refers to the free use, enjoyment and disposal of it. 1 Bl. Com. 138. It also includes the estate *in esse* in conveyances. Co. Litt. 345 b. It is often included in the word "title," which is the more general word. Ib. Such being its definition, it cannot be construed to include an additional tract of land. The next word used is "easements," and it is not contended that the fee of land passes by this word. If the demanded premises are included, it must be by virtue of the phrase "privileges and appurtenances." The last word is the one relied on by the tenants. It is conceded that generally one tract of land cannot pass as an appurtenance to another tract. This point is discussed in *Leonard* v. *White*, 7 Mass. 6. And in *Tyler* v. *Hammond*, 11 Pick. 124, Wilde, J. says it is well settled that land cannot pass as appurtenant to land. The technical signification of the word "appurtenances" is not large enough to include a distinct parcel of land, which is not described in the deed. In construing a deed, the courts seek to ascertain the intention of the grantor, and construe his language most strongly against himself; but the intention is to be gathered from the language of the instrument, and the words

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he uses are to be taken in their usual legal signification, unless it appears from the connection in which they are used that he has attached a different meaning to them. It has accordingly been held that, in a devise, land may pass under the word "appurtenances," the intention of the testator being gathered from all parts of his will, and from his own habits in respect to the use of the property. *Otis* v. *Smith*, 9 Pick. 293. The court seem to regard a will as different from a deed. It is so in two respects: 1. A testator is not presumed to use language as accurately as a grantor; 2. A will is presumed to dispose of all the estate of the testator, and, if there is no other disposition of the fee of that which is given as an appurtenance, a presumption is raised that the word was intended to include the fee.

But it is also true that, in a grant, the words will be construed according to the intent of the parties as manifested by the whole instrument, and the word "appurtenances" is subject to this rule of construction; so that, if it is apparent to the court that the grantor used it to express an idea different from its technical signification, they will construe it accordingly. *Whitney* v. *Olney*, 3 Mason, 280, and cases cited. 2 Washburn on Real Prop. 627. In *Hill* v. *West*, 4 Yeates, 142, this principle of interpretation was carried so far, in respect to a deed made in 1704, that city lots laid out under Penn's survey of the Liberties of Philadelphia were held to pass as appurtenant to a large tract of land in the county at a considerable distance from them. But the case was peculiar, and is valuable only as an extreme illustration. Where it is not clear that a grantor used a technical word in an unusual sense, it is just towards all parties to presume that he used it in its ordinary and technical sense.

It is held that flats may pass in the partition of real estate by commissioners under the phrase, "a wharf and dock, with all the privileges and appurtenances thereto belonging." *Doane* v. *Broad Street Association*, 6 Mass. 332. But the court did not regard the wharf as land, but as a structure erected upon the land; so that land might pass with it as appurtenant to it, on the same ground that it will pass with a mill or a messuage. In that case it was clear from the return of the commissioners

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that they intended to assign the flats with the wharf. In *Ashby v. Eastern Railroad*, 5 Met. 368, a deed of a wharf is held to convey the adjoining flats as appurtenant. But in all these cases the land passes with the thing described as parcel rather than as appurtenant. 2 Washburn on Real Prop. 627.

The deed of mortgage conveys the land with the new store thereon; and it is necessary to consider whether the store on the land mortgaged was so connected with the store on the demanded premises that it can be regarded as parcel of it, and so pass together with the land on which it stood. If such a construction can be given to the deed, the demanded premises may pass as parcel of the new store Holbrook bought of Dwight and others in 1842. There was then a store on the lot. He bought the demanded premises in 1845 of Lucius M. Sargent, the deed including a larger tract of land, which he afterwards sold to other parties. In 1846 an indenture was made between him and other parties, providing for a passage way in the rear of their several stores to Pearl Street. Three of the parties, including Holbrook, owned lots in the rear of this passage way, the lot of Holbrook being the demanded premises. They granted to each other, their heirs and assigns, rights of way over a strip about fifteen feet in width, each owner for himself covenanting that it should remain unincumbered. But it was agreed that Holbrook, Lawrence and Chace & Grew, who owned the rear lots, might erect back stores on their rear lots, to which they might obtain access by means of covered bridges at a certain height above the ground, and of a certain construction, and it was mutually agreed and covenanted that no one of said back stores should be rented or occupied by any person or persons, except the owner or occupants of the above mentioned stores on Milk Street, as an appendage to the same. It was also agreed that the buildings on the rear lots should never be above a certain specified height, and that the roof should be of no more than a specified inclination. A back store was built by Holbrook in 1846, and a covered bridge leading to it, in conformity with the provisions of this indenture, and he continued to occupy the back store in connection with the front store till

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after he made his mortgage to Sampson in 1854. Is this back store to be regarded as part of the front store, so as to pass as parcel of it, and thus carry with it the land on which it stands? Perhaps by the name "store" the whole would pass, had the deed contained no further description; but when the grantor adds the words, "being the same premises which Messrs. Edmund Dwight" and others "conveyed to me," this exception excludes what was not thus conveyed to him, and of course excludes the demanded premises. If then he intended to convey the demanded premises, he was unfortunate in his choice of language; for it would do violence to the language to hold that the back store and lot are included in the deed.

The fact that the back store could not be approached for ordinary use except through the front store has some tendency to show that he intended to convey both. But this fact is not sufficient to control the language of the deed; especially as he had provided a passage way to the back store independently of the front store, though the purposes for which he might approach it and occupy it were very limited. Such a restriction upon its use may affect its value, but that consideration is not very important in construing the deed. There is nothing, either in the words of the instrument or the situation of the property, to control the express declaration, that the property conveyed by the mortgage was the same that Messrs. Dwight and others conveyed to him. *Judgment for the demandant.*

HOLMES AMMIDOWN *vs.* STEPHEN BALL.

A deed of a certain described lot of land, "together with all the dwelling-house and building, with the appurtenances, situate thereon or thereto belonging. To have and to hold the above granted premises, with the privileges and appurtenances thereto belonging," includes a small lot of land adjoining the granted premises, which is habitually used with the dwelling-house, and is reasonably necessary to be held in connection with it.

WRIT OF ENTRY to recover a small parcel of land situated in the rear of a dwelling-house on Beacon Street in Boston. The following facts were agreed in this court:

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On the 18th of March 1844, Henry M. Holbrook, under whom both parties claimed title to the demanded premises, received a deed of a lot of land on Beacon Street, with a dwelling-house thereon, from Abiel Chandler; and on the 19th of the following November a deed of the demanded premises, situated in the rear of the dwelling-house, from John H. Wilkins and others. On the 11th of October 1846, Holbrook and the owners of the three adjoining lots on Beacon Street executed an indenture, reciting their ownership of said lots, which as originally laid out extended only to a certain passage which had been laid out for the common use and benefit of the owners of said lots, and that they now severally owned a small parcel of land beyond said passage, extending northerly of their lots as originally laid out, and agreeing to discontinue said passage and to establish a new one across the ends of their several lots as now owned by them, for their common use and benefit, including the right of draining. On the 10th of July 1854, Holbrook, who then occupied the house and the demanded premises, executed to James McGregor a mortgage, containing the same description of land which was contained in the deed of Chandler to him, which was followed by these words: "together with all the dwelling-house and building, with the appurtenances, situate thereon or thereto belonging. To have and to hold the above granted premises, with the privileges and appurtenances thereto belonging," &c. This mortgage was duly foreclosed, and the title under it came by mesne conveyances to the tenant. On the 13th of September 1855, Holbrook conveyed the demanded premises to the demandant.

J. G. Abbott, for the demandant.

H. C. Hutchins, for the tenant.

CHAPMAN, J. In the mortgage deed of Holbrook to McGregor, under which the tenant claims, the land first described is that which was conveyed to Holbrook by Chandler. This does not include the demanded premises. The following clause is then added: "together with all the dwelling-house and building, with the appurtenances, situate thereon or thereto belonging." The word "appurtenances" as here used refers to the appurtenances

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belonging to the house and building, and not to those belonging to the estate generally; for it is immediately followed by a general *habendum* clause relating to the whole estate, "with the privileges and appurtenances thereto belonging." So that the deed conveys not only the whole land with its privileges and appurtenances expressly, but also mentions the house and building, with their appurtenances. We must apply to this deed the well established rule of construction stated in *Salisbury* v. *Andrews*, 19 Pick. 253, that every word shall be presumed to have been used for some purpose, and shall have some force and effect if it can. According to the strict technical signification of the word, land cannot be appurtenant to a house. But where a house is conveyed with its "appurtenances," the word must refer to land if it have any meaning, and the grantor must have used it to indicate land. The older authorities on this subject are collected in *Smith* v. *Martin*, 2 Saund. 400, *note*, and they hold that at least the garden, curtilage and close adjoining the house will pass. Strictly they pass as parcel of the house. The modern authorities are at least no more strict in their definitions of the word appurtenances than the more ancient ones. Such being the rule of construction, it must be held that the demanded premises passed with the house; for they consisted of a small close or curtilage adjoining it, prepared with considerable pains to be used with it, habitually used with it, and reasonably necessary to be held in connection with it and with the passage in the rear which was appurtenant to the estate. This passage had been made appurtenant to the estate by the indenture of October 11, 1846, by which the owners of several adjoining lots had agreed that it should be so used by each of them in connection with their respective lots, and by its having been prepared for such use and actually so used up to July 10, 1854, when the mortgage was made. *Judgment for the tenant.*

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COMMONWEALTH *vs.* BOSTON AND ROXBURY MILL CORPORATION.

If a corporation which is bound by its charter to keep certain roads and bridges in repair enters into an agreement with the Commonwealth for the exchange of certain lands, and the agreement provides that until such exchange it shall remain bound, as now, to keep the roads and bridges in repair, it is not liable, in an action of contract upon this agreement, for a failure to keep the roads and bridges in repair.

CONTRACT brought in this court upon a written agreement, the material parts of which are sufficiently stated in the opinion. The defendants demurred to the declaration, and the case was reserved for the determination of the whole court.

P. W. Chandler & G. O. Shattuck, for the defendants.

Foster, A. G., for the Commonwealth.

HOAR, J. The Boston and Roxbury Mill Corporation, being bound by their charter to keep in repair certain "dams, roads and bridges," made a contract with the Commonwealth, by which they released certain lands to the Commonwealth; received a release of certain lands from the Commonwealth; stipulated for the building and maintaining of a sea wall, for filling up flats, drainage, and other objects; and which contained this clause: "It being understood, however, that said corporation has and shall have liberty at any time to surrender its toll franchise to said commonwealth, or to enter into an arrangement, subject to the covenants herein contained, with any city or town within which any parts of the dam, cross-dam, bridges or roads aforesaid are situated, for the maintenance of such parts; and that said corporation shall remain bound, as now, until such arrangement or surrender, to keep said dams, roads and bridges in good repair." It being alleged that the roads and bridges in question are out of repair, the Commonwealth brings this action upon the last branch of the foregoing clause, as upon a contract of the defendants to keep them in good repair. The defendants demur to the declaration, and we are of opinion that the demurrer is well taken. The stipulation that the corporation "shall remain bound, as now," neither by its terms nor intent imposes any new obligation; nor does it furnish any new remedy.

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Before the contract was made, the duty of the defendants to maintain the roads and bridges existed, and for neglect of the duty they were liable to indictment. The contract makes no new agreement on the subject. It merely recites that it is understood that the defendants are to remain bound as before; that is to say, they are not discharged by any of the provisions of the agreement from their existing obligations in this behalf. It is the exclusion of a conclusion which it was feared might be drawn from some of the modifications of their chartered rights which the contract contains.

Judgment for the defendants upon the demurrer

OWEN HOWARD *vs.* TIMOTHY N. HARRIS.

No action lies on a warranty given upon the sale of a horse, the price of which was paid in spirituous liquors which the purchaser could not legally sell.

CONTRACT to recover damages for a breach of warranty of a horse.

At the trial in the superior court, before *Putnam*, J., it appeared that the consideration paid by the plaintiff for the horse, at the purchase when the warranty was given, was spirituous liquors which the plaintiff was not legally authorized to sell; and the judge ruled that the plaintiff might nevertheless recover, upon proof of the other facts necessary to sustain the action.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

A. V. Lynde, for the defendant, cited *Libby* v. *Downey*, 5 Allen, 299; *Hulet* v. *Stratton*, 5 Cush. 539; *Robeson* v. *French*, 12 Met. 24; *Wheeler* v. *Russell*, 17 Mass. 258; *Lyon* v. *Strong*, 6 Verm. 219.

R. M. Morse, Jr., for the plaintiff. The statutes relating to the sale of spirituous liquors should be strictly construed. The offences specified in Gen. Sts. *c.* 86, § 30, are a sale and a gift

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A sale is a transfer of property in consideration of a sum of money to be paid for it, and is different from an exchange or barter. 1 Parsons on Con. 436. Long on Sales, 1. Addison on Con. 154. *Commonwealth* v. *Packard*, 5 Gray, 103. *Mitchell* v. *Gile*, 12 N. H. 390. *Vail* v. *Strong*, 10 Verm. 457. This transaction was neither a sale nor a gift.

Bigelow, C. J. We are all of opinion that the plaintiff cannot maintain this action on the facts set forth in the exceptions, and that the court erred in not instructing the jury to return a verdict for the defendant, on the ground that the contract of warranty was founded on an illegal consideration.

The fatal defect in the argument of the learned counsel for the plaintiff is, that it leaves wholly out of view the clear and manifest purpose of the legislature in enacting the provisions of the General Statutes regulating the manufacture and prohibiting the traffic in spirituous and intoxicating liquors. Gen. Sts. *c.* 86. If in giving a construction to the provisions of this statute we could confine ourselves to the strict technical legal definition of the word "sell," and interpret it only as meaning a transfer of property in consideration of a price paid therefor in money, we should have no difficulty in arriving at the conclusion for which the plaintiff contends. But we cannot do this unless we violate one of the cardinal rules of interpretation, and, instead of construing and applying the words of the statute to fulfil the intent of the legislature, entirely disregard and destroy that intent by a narrow and restricted interpretation of the words. It is hardly necessary to repeat the familiar rule, that statutes are to be construed according to the intention of the framers; and, if this can be ascertained with reasonable certainty, effect is to be given to it, although such construction may seem contrary to the ordinary meaning of the letter of the statutes. This is the rule, as we understand it, applicable alike to penal and remedial statutes. Indeed it is in substance prescribed by the legislature as the canon of interpretation, in Gen. Sts. *c.* 3, § 7, which enacts that words and phrases shall be construed according to the common and approved usage of the language; but technical words according to their peculiar and

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appropriate meaning, "unless such construction would be inconsistent with the manifest intent of the legislature."

Now there is no room for doubt as to the intention of the legislature in enacting the provisions of the statute restraining and prohibiting the sale of intoxicating liquors. The object was not to regulate or prohibit a particular form or mode of disposing of such kind of property. It was designed and framed to accomplish a much higher and more comprehensive purpose. Its aim was the prohibition of the trade or traffic in such liquors, in whatever mode it was carried on, with a view to prevent their common and indiscriminate use in the community. The mischief which it was intended to reach and suppress was the vice of intoxication, with the evils and crimes which it engenders. It is too obvious to admit of debate that the main purpose of the statute would fail of accomplishment, if intoxicating liquors could be freely obtained without restraint by barter or exchange of other property therefor. The prohibition of sales, in the technical sense of that word, would be of little effect, if the trade was left open to be carried on in other modes. Indeed, the construction for which the plaintiff contends would amount to a virtual repeal of the statute, in its practical operation, as a means of checking and restraining the evils which it was intended to prevent. In a general and popular sense, the sale of an article signifies the transfer of property from one person to another for a consideration of value, without reference to the particular mode in which the consideration is paid. It was in this sense that the legislature used the word, and not in the technical and narrow sense of a transfer for a price paid or agreed to be paid in money. The legal distinction between a sale and an exchange is a purely artificial one; the rules of law are the same as applied to both transactions. Chit. Con. (10th Amer. ed.) 393. Practically there is no difference between them. To make such a refinement the turning point of the interpretation of a statute, contrary to the plain intent of the legislature, would be a violation of all sound rules of construction See *Mason* v. *Lothrop*, 7 Gray, 354, 358.

Exceptions sustained.

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Nathaniel Hayes *vs.* Winslow S. Kyle & another.

A written promise to pay to the plaintiff in an action the amount which may be recovered therein within thirty days from final judgment, in consideration of the delivery by the officer to the promisor of the property attached on the writ, may be enforced, although it was made without the request or knowledge of the defendant therein, and the attached property did not belong to him, and was not in his possession, and perished before the recovery of judgment in the action.

Contract upon the following written agreement, signed and sealed by the defendants:

"Boston, May 24th 1861. Received of Harum Merrill one bay horse and one express wagon and harness, under attachment by him in suit of *Nathaniel Hayes* v. *Ruel V. Smith*, on writ returnable before the superior court in the county of Suffolk, on the first Tuesday of July next; in consideration whereof, we agree to and do hereby agree to pay to the plaintiff in said action the amount which may be recovered therein, within thirty days from final judgment in said suit, debt not to exceed forty dollars."

At the trial in the superior court, before *Allen*, C. J., without a jury, it appeared that in October 1861 Hayes recovered judgment in said action, and took out execution, and has been unable to collect the same, though thirty days and more had elapsed before the commencement of this suit. In defence, proof was offered that the property belonged to and was in the possession of Sidney Smith, the father of Ruel V. Smith, at the time of the attachment, and long before; that the contract was executed in the presence of said Sidney, but without the request or knowledge of said Ruel; and that the horse died before the recovery of the judgment by Hayes. The chief justice, however, ruled that these facts, if proved, would constitute no valid defence, and rendered judgment for the plaintiff. The defendants alleged exceptions.

J. S. Abbott, for the defendants, cited *Plaisted* v. *Hoar*, 45 Maine, 380.

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E. Pearson, for the plaintiff.

CHAPMAN, J. The first objection made to the contract declared on is, that it is without consideration. But it is a contract under seal, which imports a consideration. *Page* v. *Trufant*, 2 Mass. 159. It also states expressly a good consideration. It contains an acknowledgment by the defendants that they have received of the plaintiff certain property which was under attachment by him on a writ; and, in consideration of his having delivered the property to them, they agree to pay such amount as may be recovered in the suit, within thirty days from final judgment.

As a farther defence, the defendants offered to prove that the property spoken of in the contract did not belong to Ruel V. Smith, the defendant in the action on which the attachment was made, but to his father, Sidney Smith, and that Sidney acted in the matter without authority from his son. If this had been an ordinary receipt for attached property, with a promise to return it on demand, the fact that it did not belong to the debtor, and that it had been claimed by the owner and returned to him, might have been a good defence. *Learned* v. *Bryant*, 13 Mass. 224. But in this case the alleged owner appears to have been present and assenting to the transaction, and the agreement was under seal, and was for the payment of the debt. The question as to the title to the property thus becomes immaterial.

The defendants further say that if the transaction was otherwise valid, it is nevertheless void, because such a contract with an attaching officer is contrary to the policy of the law. But the court are of opinion that such a contract is in entire conformity with the policy of the law. When a debtor's property is attached, it is necessary for him to give a bond with sureties for the payment of the debt within thirty days after final judgment, in order to protect himself against the institution of proceedings in insolvency, in case he has other creditors. Gen. Sts. *c.* 118, § 103; *c.* 123, § 104. It would be quite proper for his father, or any other friend who should desire to protect him against a liability to such a proceeding, to become a receiptor for the property, and give a bond like that declared on. The

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fact that the horse perished before judgment is immaterial, for it was a result of the contract between the parties that the obligors assumed that risk. *Exceptions overruled.*

LEWIS AUDENRIED & others *vs.* ALBERT BETTELEY & others.

By a written instrument A. agreed to stock the wharves and yards of B. with coal, wood and bark, and to furnish B. with as much of the same as he could sell at retail, and pay him a specified price for doing the business, giving authority to B. to purchase such kinds and quantities of wood and bark as he might require. B. agreed not to sell or deal in any other coal, wood or bark than that furnished by A. or purchased on his account, and to guarantee the payment for all coal sold by him at retail, and to render to A. monthly accounts, and to credit A. with the same, as cash, at the price previously fixed upon by A. as the selling price, and to accept the drafts of A. for about the regular wholesale market price of similar coal. A. reserved the right to fix the price of coal from time to time, provided that the same should not be above the lowest market price, and it was stipulated that the books of B. should at all times be open to the inspection of A. *Held*, that the whole of the coal, wood and bark, together with the proceeds of such of it as had been sold, belonged to A.

An agency to sell merchandise for another is terminated by the agent's insolvency; and debts arising from sales made by the agent on credit, in his own name, belong to the principal, (subject to legal liens,) although, in pursuance of the agreement between the parties, the agent has rendered monthly accounts of all his sales, and given notes or acceptances to the principal for the cost of the merchandise at wholesale prices, taking a receipt, containing a promise to account for the same at maturity.

If the assignees in insolvency of an agent, who has sold merchandise for another in his own name, on credit, know that the principal claims the debts, and nevertheless proceed to collect them, they are not entitled to retain compensation for their own services, or for expenses incurred in good faith, in making the collection.

BILL IN EQUITY against Artemas Hammond, an insolvent debtor, and his assignees in insolvency, alleging, amongst other things, that said Hammond entered into a written agreement, under the name of A. Hammond & Co., to sell coal, wood and bark for the plaintiffs, and that, at the time of his insolvency, he had sold large quantities of the same for them, payment for which had been made to the other defendants, as his assignees; and praying for a decree ordering the defendants to account for and pay over the sums collected by them, and to deliver the

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books of Hammond to the plaintiffs, to enable them to collect such of the debts as are still outstanding.

The material portions of the written agreement were as follows:

"Memorandum of an agreement, made April 20, 1860, between A. Hammond & Co., of Boston, and Lewis Audenried & Co., of Boston and Philadelphia, which is to continue for two years from the first day of May next, viz:

"Lewis Audenried & Co. agree to stock the wharves and yards of A. Hammond & Co. with a full and sufficient supply of anthracite and bituminous coal, hard and soft wood, and bark, and to furnish said A. H. & Co. with as much of the same as they can sell at retail, and pay them ninety cents per ton of 2000 lbs., as specified below, for doing the business; and A. H. & Co. to purchase such kind and quantities of wood and bark as they may require, and to account to L. A. & Co. for all sold monthly at cost price per cord, allowing L. A. & Co. all overrun in measure for their profit.

"L. A. & Co. agree to furnish A. H. & Co. with anthracite and Cumberland coal, to sell by the cargo or in larger quantities, at their current prices, and allow A. H. & Co. such commission as may be agreed upon from time to time as fair and equitable. . . . . .

"A. H. & Co. agree not to sell or deal in any other coal, wood or bark, other than furnished by L. A. & Co., or purchased on their account, with their consent in writing; and to devote their time and energies to carrying on vigorously and extensively the foregoing business; and agree to receive, wharf, screen, sell, deliver and guarantee the payment of all coal sold by them at retail for ninety cents per ton of 2000 lbs., which shall cover all expenses and charges from the time said cargo is received from the vessels until delivered to the purchasers.

"A. H. & Co. agree to keep a strict account of all coal, wood and bark received and sold; and, on the fourth day of every month, to render to L. A. & Co. a true and correct account of all sold up to and including the last day of the month preceding; and to credit L. A. & Co. with the same, as cash, on that

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date, at the price previously fixed upon by L. A. & Co. as their selling price.

"A. H. & Co. agree to accept the drafts of L. A. & Co., on four months, for about the regular wholesale market price for similar coal, on the receipt of bills of lading; and, should they not be in funds to pay the freight on said coal as it is received, they shall, if L. A. & Co. request it, give their acceptances on such times as shall be agreed upon, not exceeding four months, for the amount of such profit; and, should they not be in funds from sales when such notes fall due, they are to be renewed until such times as they are in funds.

"A regular interest account shall be kept between the parties, L. A. & Co. to be debited with interest on all moneys paid by A. H. & Co. for freights or acceptances given for coal from the time such payments are made; and A. H. & Co. to be debited by L. A. & Co. with interest from the first day of every month for the coal, &c., sold the previous month. Should A. H. & Co. advance on freight or on coal more money than they are in receipt of from the sale of coal, they shall receive interest on the same; and should they receive money for the sales of coal faster than is required for the payment of freight and acceptances given on account of coal, they shall have the privilege of paying it over to L. A. & Co., thereby saving interest.

"L. A. & Co. reserve the right to fix the price of coal from time to time, both at retail and wholesale, provided the price so fixed shall not be above the lowest market price selling at the time; and A. H. & Co. agree to sell no more coal ahead than they can deliver in one week, without the written consent of L. A. & Co.

"A. H. & Co.'s books, accounts, &c., to be open to the inspection and examination of L. A. & Co. at all times. The quantity of coal, wood, &c., on A. H. & Co.'s wharves, on the first day of May next, to be estimated by ourselves, if mutually agreed; but, if not, then by three disinterested persons, and taken by L. A. & Co. at the market price for a similar quality on said day.

"All coal at the risk of L. A. & Co. until it arrives at the

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wharf where it is to be discharged; and L. A. & Co. authorize A. H. & Co. to effect insurance for a reasonable amount on the stock of coal on their wharves, payable to A. H. & Co. in case of loss."

After the former decision in this case, (5 Allen, 382,) the case was referred to a master, to find and report the facts in relation to the alleged subsequent parol agreement, and to state and report an account between the parties; and he reported the following facts:

"In pursuance of this contract, the plaintiffs from time to time furnished Hammond with coal, and Hammond purchased for them wood and bark. He made sales of the coal, wood and bark; and rendered to them monthly accounts of these sales, including sales made on credit as well as sales made for cash.

"Hammond, in books kept in his own name, entered all sales of coal, wood and bark, and charged to the purchasers those which were made on credit. He accepted the drafts of the plaintiffs, or gave them his notes, amounting in the aggregate to the cost of the coal at wholesale prices; taking their receipt for each draft or note, in which they promised to account for the same at maturity. Whenever he paid a note or draft, the amount thereof was put to his credit in the monthly account which he rendered. The notes and drafts which he did not pay, amounting in all to $15,982.54, the plaintiffs produced and offered to surrender. At their request, they are filed with this report.

"When Hammond applied for the benefit of the insolvent act, there was due from him to the plaintiffs, for sales of coal, wood and bark under the contract, the sum of $6732.90. The coal which remained on hand was appraised at $9052, and was taken from the assignees on a writ of replevin.

"Betteley and Sawyer, at the time of their appointment as assignees, were aware that the plaintiffs claimed the book debts and coal as their property. On the 26th day of July 1861, the plaintiffs demanded of the assignees the books aforesaid, or an opportunity to examine and take copies of them.

"The assignees have collected of these debts $4606.03. And

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they now have gas stock to the amount of $100.51, and two due-bills, amounting together to $90.99, taken in settlement of some of the debts. Many of the debts are not yet collected. Of the money collected, a part, viz., $547.03, was received by the assignees before the 26th day of July aforesaid. The assignees placed some of the demands in the hands of an attorney for collection. He made collections to the amount of $696.28, and charged for his services $350. These charges the assignees, in good faith, allowed and paid. The assignees claim to have allowed to them the money so expended, and compensation for their trouble in making other collections. I find that a commission of eight per cent. on the entire amount collected would be a reasonable compensation for making the collections, if the court should be of opinion that, upon the facts, they are entitled to any. There was no evidence offered of any subsequent parol agreement."

The parties also agreed that monthly accounts were rendered by Hammond to the plaintiffs, on one side of which was placed in one sum the net amount of the sales of the preceding month, and on the other the payments made by him during that month, for freight, insurance, purchase of wood and bark, and of such kinds of coal as were not furnished by the plaintiffs, including such notes or drafts as had been paid by him. The balance of each account thus made up was carried forward into the next account. No interest account was ever made up or stated upon the items in these accounts, and no settlement was ever made or attempted to be made upon them. Copies of these accounts were annexed, by which it appeared that, by the account for December 1860, the balance against Hammond, as there stated, was $83.71.

The case was reserved by the chief justice for the determination of the whole court.

S. Bartlett & D. Thaxter, for the plaintiffs, cited Story on Agency, §§ 112, 401, 420, 424; *Barry* v. *Page*, 10 Gray, 398 *Scott* v. *Surman*, Willes, 400, 405; *Garrat* v. *Cullum*, Bul. N. P 42; *Hudson* v. *Granger*, 5 B. & Ald. 27, 32–34.

J. G. Abbott & G. A. Somerby, for the defendants. 1. The

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defendants are not liable at all for moneys collected by them. Taking the whole contract together, it was the intention to permit Hammond to sell coal, &c., and account for it at a certain price fixed by the plaintiffs, for which price he would be responsible as cash. It was not a sale upon commission, as ordinarily understood and practised. The whole business was done in the name of Hammond; he could sell in his own name, on credit or for cash, and was to give notes or acceptances for the amount agreed upon, which operated as a settlement. 2. In any event, the assignees should be allowed their commissions and expenses in making the collections.

Hoar, J. When this cause was before us at an earlier stage, we supposed the legal effect of the contract between the plaintiffs and Hammond not to be in dispute. 5 Allen, 382. But, if it were open for discussion, it is very plain that under it the whole of the coal, wood and bark on the wharves and yards of Hammond was the property of the plaintiffs, and that Hammond was to carry on the business as their agent or factor. Such is the whole scope of the contract, and there are several specific provisions which it is impossible to reconcile with any other construction. Thus the plaintiffs agree to stock the wharves and yards with a full supply of coal, wood and bark, and to pay Hammond a fixed sum per ton "for doing the business." Hammond agrees not to sell or deal in any other coal, wood or bark than that furnished by the plaintiffs, "or purchased on their account, with their consent in writing;" and to "guarantee the payment of all coal sold by them [Hammond & Co.] at retail for ninety cents per ton, which shall cover all expenses and charges." All the coal, wood, &c., on hand at the time the contract took effect was to be estimated and appraised, and "taken" by the plaintiffs "at the market price." But most decisive of all is the agreement that the plaintiffs "reserve the right to fix the price of coal from time to time, both at retail and wholesale, provided the price so fixed shall not be above the lowest market price selling at the time." They may require it to be sold at as low a rate as they choose, which would be a strange stipulation in respect to the property of another.

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The agency of Hammond was terminated by his insolvency; and the property remaining, and the proceeds of such parts of it as had been sold, were the property of the plaintiffs, and subject to their disposal, unless their agent had some lien upon it which would pass to the assignees. *Scott* v. *Surman*, Willes, 400. The defendants, as assignees in insolvency, assumed no personal obligation in respect to the execution of the contract; and its provisions had been violated by Hammond, so that the plaintiffs were entitled to reclaim the property itself for their security. The fact that by the contract Hammond was to guarantee the sales gave the defendants no title to the proceeds of the property sold, unless where the amount due upon any specific sale had been accounted for to the plaintiffs, and the amount due upon it paid over to them. It appears that a great many sales have been entered upon the accounts rendered from month to month before the insolvency. But no interest account has been computed or adjusted; the balance appearing due has been regularly carried forward in account from one month to another; and we can see no evidence of any intent of the parties to treat the debts as transferred to the agent. There was, in fact, only a statement, and not a settlement of accounts.

The only other point requiring notice is the payment by the defendants of the expenses of collecting some of the debts. These payments having been made, and the collections having been made, after full notice that the plaintiffs claimed the books and accounts as their property, although made in good faith, were made in violation of the plaintiffs' rights. The defendants have therefore no claim for compensation or commissions.

Decree for the plaintiffs.

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ALBERT L. MURDOCK *vs.* JOSIAH CALDWELL.

If a written agreement has been executed by one person only, by which he agreed to deliver to another, upon the formation of a coal company, and when the certificates should have been issued, a certain amount of the stock of the company, and the agreement recites that the person who was to receive the stock agreed, in consideration thereof, to sell a certain amount of the stock of the company at a specified valuation, and collect payment therefor, a declaration in an action against the signer of the agreement is demurrable, which does not allege that there was a consideration for the defendant's promise, or that the company has been formed, the certificates issued, or the stipulated amount of stock sold and payment therefor collected by the plaintiff.

CONTRACT. The declaration was as follows:

"And the plaintiff says that he and the defendant entered into a contract together, a copy whereof is annexed; and the plaintiff has always been ready to perform the contract on his part, but the defendant has disabled himself from performing said contract, and has prevented the plaintiff from performing the same.

"(Copy of Contract.)

"Boston, May 23, 1863. I do hereby agree to deliver to Albert L. Murdock, upon the formation of the Lorberry Coal Company, when the certificates are issued, thirty-five thousand dollars in the stock of said company, at *pro rata* of $250,000 valuation; and he does, in consideration of the delivery of said stock, agree to sell and collect $50,000 of said stock upon the value above referred to, viz. $250,000; and he is to receive a reduction *pro rata* from said $35,000, if he falls short of that amount, $50,000, in cash subscriptions; this stock to be sold and paid for by the 25th of June 1863, if the company is formed by that date. Josiah Caldwell."

The defendant filed a demurrer, assigning the following causes:

"1. Because the plaintiff does not allege in his said declaration that he has ever performed his part of the contract annexed to said declaration, and made a part thereof, or any excuse for such non-performance; 2. Because the plaintiff does not allege in his said declaration that the defendant has committed a

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breach of said contract, or refused to perform his part of the same; 3. Because the plaintiff does not allege in his said declaration, nor does it appear by said contract, that there was any consideration for the defendant's entering into the same; 4. Because the defendant had the right, under said contract, to annul the same at any time before performance by the plaintiff of his part of said contract; 5. Because the defendant had the right, under said contract, to disable himself from performing said contract, and to prevent the plaintiff from performing the same."

The case was reserved in this court for the determination of the whole court.

C. W. Huntington, for the defendant.

W. S. Leland, for the plaintiff.

CHAPMAN, J.* By Gen. Sts. *c.* 129, § 2, a plaintiff is allowed to omit all averments which the law does not require to be proved, and to set forth the substantive facts necessary to constitute the cause of action with substantial certainty, and without unnecessary verbiage. In declaring on a written instrument, he may, among other methods of declaring, set out a copy, with proper averments to describe the cause of action.

The plaintiff in this action declares on a contract not under seal, and annexes a copy. But as the copy is signed by the defendant only, and purports to be merely his agreement with the plaintiff, and as the declaration merely avers that the parties entered into that contract, there is no proper averment of a consideration. It is true that the contract of the defendant states certain things that the plaintiff has agreed to do; but it contains no promise of the plaintiff to do them, and there is no averment that he made such promise. His promise, if it constituted the consideration, should have been set forth with substantial certainty; for it is one of the substantive facts necessary to be proved.

If the consideration were set forth, the declaration would still be defective. The defendant's promise is not absolute, but was to be performed only upon the organization of the coal

* HOAR, J. did not sit in this case.

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company, the issuing of certificates, the sale of a certain amount of the stock, and the collection of payment therefor by the plaintiff. It is not averred that any of these conditions were performed. It is alleged that the defendant has disabled himself from performing the contract, and has prevented the plaintiff from performing the same; but no substantive act of the defendant is set forth in support of either of these allegations. The acts done by the defendant are the matters to be proved, and whether they operated to disable the defendant from performing his contract, or to hinder the plaintiff from performing his contract, is a conclusion of law. The first and third causes of demurrer, being well alleged, are sustained.

FRANK B. DENNY & another *vs.* LYDIA B. DENNY.

This court has authority to entertain a petition filed by a third party, representing that a libellant for divorce is insane; and, if such insanity is established, the court will appoint a guardian *ad litem* to conduct the cause for the libellant.

PETITION filed by two of the children of Reuben S. Denny and Lydia B. Denny, in a suit for divorce brought by said Lydia against said Reuben, representing that the libellant, at the time of filing said libel, was and still is insane; and praying that a guardian *ad litem* may be appointed to take charge of the suit. The libellant filed a motion to dismiss the petition, on the ground, among others, that the court had not authority in law to grant the prayer thereof; and this question was reserved by the chief justice for the determination of the whole court, with the agreement that, if the court should be of opinion that the petition can properly be prosecuted, the case should stand for a hearing on other grounds alleged for the dismissal of the petition.

B. F. Thomas & R. Olney, for the petitioners, cited *Broadstreet* v. *Broadstreet*, 7 Mass. 474; *Mansfield* v. *Mansfield*, 13 Mass. 412; *Mitchell* v. *Kingman*, 5 Pick. 431; *Blood* v

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Harrington, 8 Pick. 552; *Guild* v. *Cranston*, 8 Cush. 506; *Davenport* v. *Davenport*, 5 Allen, 464; *Malin* v. *Malin*, 2 Johns. Ch. 238; *Howlett* v. *Wilbraham*, 5 Madd. 423; *Piddocke* v. *Smith*, 9 Hare, 395; Story Eq. Pl. §§ 64–66, 70; 1 Dan. Ch. Pr. 107, 202, 203; 2 Ib. 870, 871; Shelford on Lunatics, 415, 416, 424–426; 2 Kent Com. (6th ed.) 229; Co. Litt. 88 b, *n.* 10, 135 b, *n.* 1.

S. E. Sewall & J. P. Bishop, for the respondent. The legislation in this commonwealth concerning guardians of insane persons covers the whole subject, and no provision is made for the interference of third persons in a case like the present. Gen. Sts. *c.* 107, § 16; *c.* 109, §§ 8, 12; *c.* 127, § 23. *Commonwealth* v. *Cooley*, 10 Pick. 37. *Mason* v. *Waite*, 1 Pick. 452. *Bartlet* v. *King*, 12 Mass. 545. *Goodenow* v. *Buttrick*, 7 Mass. 140. Before these statutes, an insane person might bring a libel for divorce in her own name. *Broadstreet* v. *Broadstreet*, 7 Mass. 474. 1 Tidd's Pract. (4th Amer. ed.) 92, 93. And she may do so still. *Warden* v. *Eichbaum*, 14 Penn. State R. 121. *Bawden* v. *Bawden*, 2 Swab. & Trist. 417. Proceedings for the appointment of a guardian should be in the probate court. *Mansfield* v. *Mansfield*, 13 Mass. 412. This petition is filed by intermeddlers, and should therefore be dismissed. *Stearns* v. *Stearns*, 10 Verm. 540. *E. B.* v. *E. C. B.*, 28 Barb. 299. An *amicus curiæ* does not appear by counsel, or plead, or bring forward witnesses, or address the jury. *Little* v. *Little*, 13 Gray, 264. Bouvier's Law Dict. *Amicus Curiæ*. The question of insanity should only be tried, in this case, upon regular pleadings. *Coburn* v. *Whitely*, 8 Met. 272. *Griffin* v. *Rising*, 2 Cush. 75. *Hayward* v. *North Bridgewater*, Ib. 419. She would be bound by her acts in court, though insane. *Beverly's Case*, 4 Co. 123 b.

Dewey, J. We have no doubt as to the authority of this court, upon a representation made to us that the libellant in a libel for divorce is insane, to take notice of such representation, and, in such manner as the court may deem proper, to make the necessary preliminary examination as to such fact. This power is one necessarily existing in the court, as well for the protection of the libellant as for the orderly and proper conducting of the suit.

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The doctrine, as stated in Story Eq. Pl. § 66, is, that where persons are incapable of acting for themselves, although not strictly idiots or lunatics, the suit may be brought in their name, and the court will authorize some suitable person to carry it on as their next friend. In every such case, it is in the discretion of the court to allow the case to proceed or not. In *Malin* v. *Malin*, 2 Johns. Ch. 240, the chancellor says, "a person incompetent to protect himself, from age or weakness of mind, or from some religious delusion or fanaticism, *quem urget fanaticus error, vel iracunda Diana*, ought to come under the protection of the court." See also *Nelson* v. *Duncombe*, 9 Beav. 211; *Wartnaby* v. *Wartnaby*, Jacob, 377.

The power of the court to act upon this subject is not taken away by the provisions of the Gen. Sts. *c.* 107, § 16, requiring a libel in behalf of an insane person to be signed by the guardian, or some person admitted by the court to prosecute the same as the next friend of the libellant; or by the provisions of Gen. Sts. *c.* 127, § 23, as to the case of one becoming insane after the institution of the proceedings for divorce; or by the more general provisions found in Gen. Sts. *c.* 109, § 8, authorizing the judge of probate to appoint a guardian to an insane person. These provisions do not limit the power of this court in the proper exercise of its duty in reference to an application like the present.

The attention of the court may properly be directed to an inquiry upon this subject by a third party not connected with the suit as one of the immediate parties thereto. The libellee may not choose to make a defence of this character, and may file no answer or suggestion raising any question of the sanity of the libellant. A question so vital to the proper exercise of the jurisdiction of the court over the parties may only be presented from other sources. It will be within the discretion of the court, acting with reference to the circumstances of each particular case, to decide whether it demands a preliminary inquiry as to the sanity of the libellant, with a view to secure the proper administration of justice and the rights of all parties, and if deemed necessary the court will direct what mode shall be

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adopted to ascertain the facts as to the alleged incapacity of the party. If such incapacity is established to the satisfaction of the court, they will appoint a guardian *ad litem* to conduct the case. In making such appointment, no person should be selected who may be adverse in feeling or interest to the libellant, but one who will faithfully protect her rights and interests in reference to the matter of the libel.

The case is to stand for further hearing.

IRA H. BICKFORD *vs.* JOHN M. BARNARD & another.

A discharge in insolvency is a bar to the recovery of damages for the conversion of goods, though such damages are alleged by way of aggravation in an action of tort for breaking and entering the plaintiff's close.

TORT for breaking and entering the plaintiff's workhouse and store-room, and taking and carrying away therefrom a large quantity of the plaintiff's goods. An arbitrator, to whom the case was referred, awarded that the plaintiff was entitled to recover the sum of $2715.98, with interest and costs, and that, after the commencement of the action, the defendants filed their petition in insolvency, and duly obtained their discharge. The case was thereupon reserved by the chief justice for the determination of the whole court.

G. A. Somerby, for the plaintiff. This action is not for the conversion of goods. It is for the breaking and entering, and the taking of the goods was mere aggravation, affecting only the question of damages. *Phelps* v. *Morse*, 9 Gray, 207. *Knapp* v. *Slocumb*, Ib. 75. *Robbins* v. *Sawyer*, 3 Gray, 375. *Gilbert* v. *Thompson*, 9 Cush. 348. *Eames* v. *Prentice*, 8 Cush. 337. *Sawyer* v. *Ryan*, 13 Met. 144. Therefore the plaintiff could not have proved the claim in suit against the insolvent estate of the defendants, and their discharge applies only to debts which were provable. *St.* 1838, *c.* 163, §§ 3, 6.

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H. C. Hutchins, for the defendants.

Bigelow, C. J. So far as the claim of the plaintiff in this action includes damages for the wrongful taking and carrying away of chattels by the defendants, it comes within the express provision of the insolvent law; *St.* 1838, *c.* 163, § 3, reënacted in Gen. Sts. *c.* 118, § 25; and may be proved against their estate in the hands of assignees. The enactment is explicit, that "all demands against the debtor for or on account of goods or chattels wrongfully obtained, taken or withheld by him, may be proved and allowed as debts," to the amount of the value thereof; and it is also provided in *St.* 1838, *c.* 163, § 7, Gen. Sts. *c.* 118, § 76, that such demands shall be barred by the discharge granted to the debtor.

The error into which the plaintiff's counsel has fallen consists in looking only at the form of the action in which the plaintiff seeks to recover his damages of the defendants, instead of regarding the elements of which these damages are made up. It is the nature of the demand, not the technical form of action in which it is sought to be recovered, which constitutes the test by which to ascertain whether a claim for damages, or any portion of it, can be proved in insolvency and is barred by a discharge. If a part of the damages claimed by a plaintiff in an action for breaking and entering his close is for the value of goods wrongfully taken at the time of such breach and entry, it is to that extent "a demand" within the meaning of the statute, and provable as a debt against the estate of the trespasser, and barred by his discharge. The form of action in which such damages may be claimed is wholly immaterial. If it were not so, the statute would not be uniform in its operation. Its application would depend in many cases on the form of action in which a party might elect to enforce his remedy. Indeed, if the position assumed by the plaintiff can be maintained, we can see no reason why, in every case where a wrongful seizure of chattels, however great their value, is accompanied by a technical breach of the close, occasioning nominal damages only, it would not be in the power of the party injured, by commencing an action of trespass *quare clausum*, to render the whole claim

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incapable of proof against the estate of the trespasser in insolvency, and to deprive him of the benefit of his discharge as to the larger part of the claim for damages. Such a result could not have been contemplated by the legislature. Nor do we think it to be a necessary or reasonable interpretation of the language of the statute. No good reason can be given for excluding from proof a claim for damages for taking and converting chattels, because at the same time there was also a trespass committed on land. This fact does not change the nature of the damage caused by the wrongful seizure of the chattels, nor does it in any degree modify or affect the reason on which the provision of the statute allowing proof of such damages as a debt is founded. When goods have been taken and converted by a debtor, his estate has been benefited to the extent of their value. It is, therefore, just and reasonable that the person injured should have a right to share in the assets, which have been increased by the wrongful conversion of his property, and the equity and reasonableness of this claim are the same, whether the chattels were wrongfully taken without the commission of any other trespass, or were seized simultaneously with a tortious entry on land. Such was manifestly the view entertained by the learned commissioners who framed the insolvent law. In their report to the legislature, speaking of the provisions in the act concerning the proof of debts, they say that they have proposed to extend it "to all cases, even mere torts, where goods or any valuable property have been wrongfully obtained, taken or withheld by the debtor; confining, however, the sum to be allowed against the estate to the amount to which the estate has been benefited, and that of the claimant injured." Senate Doc. 1831, No. 5, p. 13.

Nor can we see any practical difficulty in the administration of the insolvent law, which will arise out of the construction which we think ought to be given to this provision concerning the proof of claims for the wrongful conversion of personal property. When the trespass is of a mixed character, and the claim for damages includes an injury caused by the breach of a close as well as by a taking of chattels, there can be no embarrassment

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in distinguishing between these two elements of damage, and making a severance of them, so that the party injured may prove his claim for the conversion of personal property, and retain his right of action for injury to the realty. They are distinct substantive grounds of damage, having no necessary connection with each other, and readily susceptible of being separately established by evidence. Nor would a satisfaction of one portion of the damage as a distinct ground of claim operate to discharge or release the others. A provision to this effect was inserted in the insolvent act as originally reported by the commissioners to the legislature, but it was stricken out for the reason, as we suppose, that it was deemed to be useless and unnecessary.

The case of *Hapgood* v. *Blood*, 11 Gray, 400, is widely different from the case at bar. That was an action in which the whole damages claimed were for injuries to real estate. The defendant set up his discharge in insolvency as a bar to a part of the plaintiff's claim, which embraced the value of timber which the defendant had cut down and carried away. But it was held that such a claim was not provable as a debt, nor barred by a discharge, under the insolvent laws. It was not a demand in whole or in part for goods or chattels which the defendant had taken and converted, but solely for injury to realty, which was clearly not included among the claims enumerated in the statute which could be proved against the estate of the defendant.

In order that the rights of the parties to this suit may be properly adjusted, the case must be, in conformity to these views, recommitted to the arbitrator, with instructions to ascertain the amount of the plaintiff's claim for damages, for taking and converting goods and chattels, and to receive the discharge of the defendants in insolvency as a bar to the maintenance of the action to recover damages therefor; and also to ascertain and determine the amount of damages sustained by the breach of the plaintiff's close, and to make an award for that sum in favor of the plaintiff.

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GEORGE B. BLAKE & others *vs.* ISAAC AMES & another.

If the holders of a promissory note have been allowed to make a double proof, against the insolvent estate of the maker and also of the indorser, and a second dividend has been declared from one of these estates, which, with a dividend already received from each of them, amounts to more than the claim as proved, though less than the claim with interest, they are not entitled to receive any more of such second dividend than will satisfy the amount of their claim as proved, until the other creditors have also received the full amount of their claims as proved.

BILL IN EQUITY praying for the reversal of a decree of the judge of insolvency, by which the surviving assignee of the estate of Charles H. Mills & Co., insolvent debtors, was ordered not to pay to the plaintiffs the whole of a dividend declared from said estate upon a claim proved by them against it. The case was reserved by the chief justice for the determination of the whole court, upon facts which are sufficiently stated in the opinion.

B. F. Brooks & J. D. Ball, for the plaintiffs, cited *Ex parte Wyldman*, 2 Ves. Sen. 113; *Sohier* v. *Loring*, 6 Cush. 548; *Ex parte Martin*, 2 Rose, 87; *Ex parte Reed*, 3 Deac. & Chit. 481; Shelford Bankr. L. 322, 323; Archbold on Bankr. 124, 125; Chit. Bills, (10th Amer. ed.) 729; *Ex parte Reeve*, 9 Ves. 588; *Brown* v. *Lamb*, 6 Met. 210; *Williams* v. *American Bank*, 4 Met. 321.

A. H. Fiske, for the defendants, cited, in addition to cases cited for the plaintiffs, *Thomas* v. *Minot*, 10 Gray, 263; *Ex parte Clarke*, 4 Ves. 677; *Ex parte Wood*, 2 Mont. Deac. & De G. 283; *Ex parte Minchin*, 2 Glynn & Jam. 287; *Buffum* v. *Deane*, 4 Gray, 388; *Bromley* v. *Goodere*, 1 Atk. 75; *Ex parte Koch*, 1 Ves. & B. 342; *Ex parte Greenway*, Buck, 412.

HOAR, J. The question in this case is a new one. The plaintiffs, being the holders of certain promissory notes on which William Mason & Co., insolvent debtors, are promisors, and Charles H. Mills & Co., insolvent debtors, are indorsers, have been admitted to a double proof in insolvency against the estates of the two partnerships. They have received a dividend on their

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proof against William Mason & Co., and a dividend on their proof against Charles H. Mills & Co. A second dividend has been declared and become payable on the estate of Charles H. Mills & Co., which, with the other dividends, would amount to more than the whole sum proved by them against that estate, but would be less than the whole amount due to the plaintiffs, with interest computed to the date of this last dividend. The question is, whether they are entitled to receive the whole of the dividend, or only so much as will satisfy in full the amount of their debt as proved? This does not appear to have been settled by any case in this commonwealth, or under the bankrupt law in England.

The case of *Sohier* v. *Loring*, 6 Cush. 548, established the right of a double proof, by the holder of a promissory note, against the estate of the promisors, as well as against the estate of the indorsers, and the right to receive dividends from each estate until the debt is fully satisfied. It has also been held that when the estate of an insolvent is more than sufficient to pay the debts proved, the creditors are entitled to receive, from the surplus, interest to the time of payment, before any of the estate shall be returned to the debtor. *Brown* v. *Lamb*, 6 Met. 209. *Williams* v. *American Bank*, 4 Met. 317. *Buffum* v. *Deane*, 4 Gray, 388.

But the question here is not between the debtor and his creditors, but as to what shall be deemed the full amount of the debt to be satisfied as between the creditors themselves. And we think as between creditors, or separate classes of creditors, the debt due to any creditor is to be taken to mean his debt as provable and proved under the provisions of the insolvent laws.

The case of *Thomas* v. *Minot*, 10 Gray, 263, was founded upon this rule; but differs from the case at bar in one respect. In that case the separate creditors claimed that, in addition to the full dividend ordered upon their debts as proved, they should also receive interest down to the time of payment, before any surplus of the separate estate should be carried to the credit of the joint estate; and this claim was denied. In this case the plaintiffs ask for no more than the dividend ordered upon their

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debt proved; but ask that, to the extent of that dividend, they may be allowed to receive and retain not only enough to pay their debt in full as proved, but the interest to which, as against the debtor, they would be entitled down to the time of payment. And they rely on the two English cases of *Ex parte Martin*, 2 Rose, 87, and *Ex parte Reed*, 3 Deac. & Chit. 481. Those cases, however, were both cases in which the bills upon which proof had been made were held as collateral security to another and principal debt; and we think that they were decided correctly upon that distinction. Where the debt proved is collateral security to another debt, the creditor is entitled to the full benefit of his security. The debt to be satisfied is not limited by the amount of any proof, and does not depend upon the amount or value of the security. It is the whole amount due as between the debtor and creditor at the time it is finally paid and discharged.

But as between different creditors, when the inquiry is whether the debt proved is satisfied, its amount can only be determined by the proof. The creditor has the full benefit of his security, by the proof which he is allowed to make against the several parties to the note. But he can receive no payment which will exceed the amount of his debt as proved, until other creditors have also received the whole amount of their debts as proved, because as against them his debt as proved is the whole debt to be satisfied. In this decision we merely extend the principle of *Thomas* v. *Minot* to a case which, we think, in conformity with the spirit and general theory of the insolvent act, equally calls for its application.

There would be no equity in allowing the plaintiffs interest upon the sum which they were entitled to receive, for the time during which its payment has been delayed in consequence of the pendency of the petition.

Demurrer sustained, and bill dismissed with costs.

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Alpheus M. Stetson *vs.* James D. O'Sullivan & wife.

A deputy sheriff cannot, by virtue of an execution, sell and convey an equity of redemption of land of the judgment debtor to the debtor's wife; but the title remains in the husband, notwithstanding such conveyance.

If upon such sale and conveyance the debtor and his wife mortgage the premises to secure their joint note for the price of the equity, she is not liable upon the note. Upon payment of the sums secured by the mortgages upon the land, the title is in the husband. And if such payment is made by her out of her separate funds, and it does not appear that the land is worth more than the sums so paid by her, a conveyance thereof by him to her, through the intervention of a third person, within a few days prior to his going into insolvency, may be sustained, if not shown to have been actually fraudulent.

Writ of entry. It was agreed, in the superior court, that the tenant, James D. O'Sullivan, being the owner of the demanded premises, mortgaged the same to the Suffolk Mutual Loan and Accumulating Fund Association on the 28th of April 1857; that in 1859 his equity of redemption thereof was attached in suits brought against him by creditors, and sold by Bayley, a deputy sheriff, on the executions which were obtained, to the tenant Ellen O'Sullivan, then and now the wife of the other tenant, and said Bayley executed a deed of the same to her on the 19th of September 1859; that she paid no money upon receiving said deed, but on the same day gave therefor the joint note of herself and her husband, payable in six months, and secured by mortgage of the equity, to Crafts and Ward, who were attaching creditors; that she paid fifty dollars from her separate property upon this note at its maturity; that on the 23d of March 1862 said James paid to her the sum of seven hundred and thirty dollars, which he had previously borrowed of her; that with this money, on the 27th of March 1862, and in her husband's presence, she paid the amounts due upon both of said mortgages, the first of which was assigned to him, and the other was discharged; that on the 1st of May following he conveyed the premises, for a nominal consideration, to Charles J. McCarthy, who on the same day conveyed the same to her; and that on the 5th of said May said James went into insolvency,

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and his assignee sold and conveyed the premises to the demandant.

Upon these facts judgment was rendered in the superior court for the demandant, and the tenants appealed to this court.

R. M. Morse, Jr., for the tenants.

J. D. Thomson, for the demandant.

CHAPMAN, J. On the 28th of April 1857, the title to the demanded premises being in the defendant, James D. O'Sullivan, he made a mortgage of the same to the loan and fund association. On September 19th 1859 the deputy sheriff, Bayley, having attached the equity of redemption on mesne process, and also taken it on execution against James D. O'Sullivan, sold the same and made a deed thereof to the defendant Ellen, the wife of James. But no title passed by this deed. Such a conveyance is made by an officer by virtue of a power created by statute. *Dow* v. *Lewis*, 4 Gray, 468. His attachment on mesne process and levy of the execution do not pass the title to himself, but merely create a statute lien for the benefit of the creditor. When the sale is made, his deed conveys the title of the debtor to the purchaser, and not any title of his own. If therefore, he could make a valid deed to the debtor's wife, it would operate as a conveyance of the husband's title directly from him to the wife. A wife has always been held incompetent to take a title directly from her husband during coverture, and the fact that the conveyance is executed by an officer by virtue of a statute power is not much less objectionable than a deed executed by the husband himself to his wife. The statute reserves to the debtor a right to redeem the property within one year, by paying or tendering to the purchaser the sum for which it was sold, with interest, and the amount expended for taxes, repairs and improvements, deducting rents and profits. The purchaser must make and acknowledge a deed of release to him, and, upon his refusal to render an account and execute a release, the debtor may bring a suit against him. The policy of the law is so strongly opposed to transactions of such a character between husband and wife that they could not have been within the contemplation of the statute.

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But on the same day both the tenants joined in a mortgage deed of the premises to Crafts and Ward, to secure the payment of their joint note. The title to the equity of redemption, not having passed to Ellen, was still in James D. O'Sullivan, and passed by that conveyance in mortgage. The note was valid against him, though not against her; because, as the property had not passed to her, she was not authorized by *St.* 1857, *c.* 249, to make such a contract, though it was to raise the purchase money for the equity. The case of *Parker* v. *Kane*, 4 Allen, 346, is not applicable to the facts in this case.

When Crafts and Ward discharged their mortgage on the 27th of March 1862, the title to the equity of redemption was thereby revested in James D. O'Sullivan, and the assignment of the mortgage of the loan and fund association to him on the same day left the whole estate in him without incumbrance. On the first of May 1862, he quitclaimed the land to Charles J. McCarthy, on condition that McCarthy should convey it to the wife, and on the same day McCarthy conveyed it to her for a nominal consideration. This was a few days before the husband went into insolvency. But it does not appear that there was any fraud in the transaction, and the deed of the husband to McCarthy recites that the wife had paid the whole amount due on the mortgage to the loan and fund association, and it appears that she also paid the amount due on the mortgage to Crafts and Ward with her own money. It does not appear that the land was of greater value than the amount thus paid for it by her. On the contrary, if the sheriff's sale was fair, she paid to him, through Crafts and Ward, the full value of the equity of redemption, and was equitably entitled to the land when the mortgage of the loan and fund association was assigned to her husband. The object of the deeds of her husband and McCarthy was to vest in her the legal title, which she ought equitably to have.

It is not stated that her husband had any creditors at the time of the conveyance to her, though his going into insolvency five days afterwards makes it extremely probable that he was then in debt. In the facts stated there is nothing to show that

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the conveyance was fraudulent as to creditors, or contrary to the provisions of the insolvent law. The title of Ellen O'Sullivan must therefore be regarded as valid under the deed of McCarthy.

Judgment for the tenants.

WILLIAM A. COCHRAN & another *vs.* NATHANIEL P. DUTY.

A written agreement in this form: "Borrowed and received of A. two hundred and sixty dollars, which I promise to pay on demand with interest," imports a consideration on its face; and if the defendant, in an action upon it, has introduced evidence tending to show that it was without consideration, the plaintiff may prove that it was given in payment of a debt of a third person, although there is no averment to that effect in the declaration

CONTRACT upon the following written agreement: "$260.90. Boston, Oct. 20, 1857. Borrowed and received of Cochran & How two hundred and sixty $\frac{90}{100}$ dollars, which I promise to pay on demand with interest. N. P. Duty." The defence was, a want of consideration, and that the paper was given for the accommodation of the plaintiffs.

At the trial in the superior court, before *Putnam*, J., after the production of the paper, the defendant testified that he signed it simply for the accommodation of the plaintiffs; whereupon they were allowed to introduce evidence tending to show that it was given in part payment of an account due to the plaintiffs from third persons. The defendant objected to this, because the declaration set forth no such claim; because the paper expressed on its face that it was for money borrowed; and because a promise to pay the debt of a third person is not valid unless made in writing. The defendant also requested the court to instruct the jury that the burden was on the plaintiffs to prove that this paper was given in payment of the claim referred to. The judge ruled that the burden was on the plaintiffs throughout, to prove a consideration; but that the paper itself imported a consideration on its face, which made a *prima facie* case, and, since the defendant had set up in his answer that it was given

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for the accommodation of the plaintiffs, it was incumbent on him to prove that fact, if he would overcome the plaintiffs' *prima facie* case.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

G. E. Betton, for the defendant.

F. W. Hurd, for the plaintiffs, was not called upon.

DEWEY, J. 1. This case presents no question as to the effect of an oral promise to pay the debt of another. The promise, such as it was, was in writing, and seems to have been given in actual payment of a debt of third persons, as the jury must have found by the verdict which they returned.

2. The declaration properly set forth this written promise, and no necessity existed for setting forth that it was given on account of the debt of third persons. *Sexton* v. *Wood*, 17 Pick. 110.

3. The judge properly ruled that the writing itself imported a consideration on its face, which made a *prima facie* case as to the consideration. No ground of exception exists to the ruling in reference to the burden of proof, as to the consideration.

4. The evidence on the part of the plaintiffs was properly admitted. *Exceptions overruled.*

JOHN BELCHER & others *vs.* ALONZO FARRAR.

Under Gen. Sts. c. 26, § 52, the selectmen of a town, acting as a board of health, may by a general order forbid the exercise of an offensive trade or employment therein, without first giving notice to those who at the time are engaged in carrying on the same.

BILL IN EQUITY brought by the selectmen of the town of Winthrop, acting as a board of health, there being no board of health chosen by the inhabitants of said town, praying that the defendant might be restrained from operating his works for the manufacture of kerosene oil therein. A temporary injunction was issued, and afterwards dissolved.

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At the hearing in this court, before the chief justice, it appeared that the defendant was engaged in the manufacture of kerosene oil in that town, and on the 29th of May 1862 the selectmen, acting as a board of health, passed a general order, determining that the making of kerosene oil was a nuisance, and dangerous to the public health in the town, and attended by noisome and injurious odors, and otherwise injurious to the estates of the inhabitants, and forbidding the exercise of such trade or employment within the limits of the town; that said order was recorded in the records of the town on the same day; and that no prior notice was given to the defendant, but a notice of the passing of the order was served upon him on the 7th of June 1862.

The question was reserved for the determination of the whole court, whether the selectmen, acting as a board of health, had authority to pass said order, so as to be binding on the defendant, without first giving him notice.

G. A. Somerby, for the plaintiffs, cited Gen. Sts. *c.* 26, §§ 52–60; *St.* 1855, *c.* 391; Rev. Sts. *c.* 21; *Commonwealth* v. *Howe*, 13 Gray, 30; *Herrick* v. *Smith*, 1 Gray, 18; *Commonwealth* v. *Alger*, 7 Cush. 86; *Commonwealth* v. *Tewksbury*, 11 Met. 58; *Baker* v. *Boston*, 12 Pick. 193.

E. D. Sohier & B. F. Brooks, for the defendant. The power conferred by Gen. Sts. *c.* 26, § 52, to suppress a trade when deemed injurious to estates, by an act legislative in its nature, could never have been intended to be vested in selectmen. See *Rogers* v. *Barker*, 31 Barb. 447; *Reed* v. *The People*, 1 Parker's Crim. Cas. 481. A trade is not a nuisance *per se;* whether it is a nuisance or not depends upon circumstances. The power to suppress a trade is judicial only. The statute contemplated the action of the board of health in each individual case. The plaintiffs have gone far beyond their authority, and their action is therefore wholly void. *Austin* v. *Murray*, 16 Pick. 121. The power conferred by the statute, being judicial, cannot be exercised without notice to parties interested; especially to those actually engaged in carrying on the trade in question. *Commonwealth* v. *Cambridge*, 4 Mass. 627. *Chase* v. *Hathaway*, 14 Mass. 222.

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Hathaway v. *Clark*, 5 Pick. 490. *Allis* v. *Morton*, 4 Gray, 63. *New Jersey Turnpike* v. *Hall*, 2 Harrison, (N. J.) 337. *Youngs* v. *Overseers of Hardiston*, 2 Green, (N. J.) 517. *Bouton* v. *Neilson*, 3 Johns. 474. Even if the power was *quasi* legislative, notice should have been given. *People* v. *Board of Health of New York*, 33 Barb. 344.

Bigelow, C. J. There can be no doubt that the order of the selectmen on which these proceedings are based was passed in conformity to the letter of the statute under which they purported to act. By Gen. Sts. *c.* 26, § 52, they are expressly authorized and empowered, in their capacity as a board of health, to forbid the exercise of any trade or employment within the limits of the town for which they are chosen, "which is a nuisance or hurtful to the inhabitants, or dangerous to the public health, or the exercise of which is attended by noisome and injurious odors, or is otherwise injurious to their estates." We think it equally clear that the power thus vested in them is in its nature *quasi* judicial. Its exercise necessarily involves the determination of the question whether a particular trade falls within the category contemplated by the legislature in the enactment before cited, and requires the officers charged with the duty to use their discretion and judgment in adjudicating on the subject matter. This is the decisive test that the authority vested in them is judicial and not ministerial merely. *Ela* v. *Smith*, 5 Gray, 121, 136. But it does not follow, because the selectmen were called on to act judicially in the premises, that their proceedings, so far as they affected the rights and property of the defendant, were illegal and invalid. It is true that no previous notice was given to him of their intention to adjudicate on the subject matter. But in a case like the present we do not think such preliminary notice essential to the exercise of the jurisdiction conferred by law. The statute under which the selectmen acted requires no notice or summons to be issued to any party interested. This, however, would be by no means decisive, if the doings of the selectmen were final and conclusive upon the defendant, so that no means or opportunity was left open to him to review their adjudication, or to litigate the

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question whether the use of his property for the manufacture of a particular article could properly be deemed a fit subject for prohibition under the provisions of the statute. If such was the necessary result of the exercise of the jurisdiction conferred on the selectmen acting as a board of health, we cannot doubt that a preliminary notice would be essential to the validity of any adjudication by them, restricting the use of private property. It would violate one of the fundamental principles of justice to deprive a party absolutely of the free use and enjoyment of his estate under an allegation that the purpose to which it was appropriated, or the mode of its occupation, was injurious to the health and comfort of others, and created a nuisance, without giving the owner an opportunity to appear and disprove the allegation, and protect his property from the restraint to which it was proposed to subject it. But on looking at the provisions of the statute, it will be found that proceedings under Gen. Sts. *c.* 26, §§ 52, 55–60, before selectmen acting as a board of health, though summary in their nature, are not final or conclusive on the rights of parties thereby affected, but are only of a preliminary and initiatory character, and that ample provision is made by which an owner of property, who may be affected by any order or decree which the selectmen may pass, may obtain a revision of their adjudication, and its modification or reversal if it is unjust or erroneous. By § 56, any persons aggrieved by an order of the selectmen may appeal therefrom, and have the whole matter involved in the issue tried by a jury, who by § 58 have power to alter, annul or affirm the order.

But it is objected that pending such appeal the order of the selectmen is peremptory and obligatory, and the owner may thereby be deprived for a period of time of the use of his property, without having had any previous notice of the intention to pass such order, or any opportunity to be heard on the question whether the trade or manufacture carried on by him is such as to bring it within the class which the selectmen have authority to prohibit within the limits of the town. This is certainly so. It is expressly provided by § 57 that such trade or employment shall not be exercised contrary to the order, during the pendency

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of the appeal. But such a temporary suspension of the right to the free use of property is not only not inconsistent with the principles of natural justice, but is in accordance with the well settled course of judicial proceedings in analogous cases. All general rules and maxims of government and law, founded on abstract truths, are necessarily subject to certain qualifications and modifications, which are essential to adapt them to each other and secure their harmonious operation as applied to the practical affairs of life. The unrestrained enjoyment of property by its owner is an abstract right, but it is to be exercised in subordination to another rule equally clear, embodied in the maxim, *Expedit reipublicæ ne sua re quis male utatur.* So the right of the subject to the liberty of his person is indisputably clear; but it cannot be enjoyed if the good of society requires his restraint, or if the rights of others will be endangered or lost if he is permitted to go free. It is therefore no violation of principle to suspend the appropriation of private property to a particular use alleged to be hurtful and injurious to others, until it can be ascertained judicially whether such allegation is well founded; nor can it be said to be an unlawful infringement of the liberty of the citizen to arrest him on a charge of crime, or on an allegation of injury to the person or property of third persons, until it can be determined whether his release will be consistent with the peace and good order of society, or a due regard to the security and preservation of the rights of others. It is upon this ground that courts of equity are empowered to issue injunctions to restrain the use of property, and courts of law are authorized to issue writs and warrants for the arrest of the person. Such processes are only preliminary. They do not conclude the rights of parties, but are merely the initiatory steps in the administration of justice, which, when followed up in due course of law, will lead to judgments by which those rights can be finally adjudicated and settled. Of this nature are the proceedings in controversy in the present case. The prohibition of the selectmen under § 52 is intended to operate only as a temporary suspension of the use of property, if the owner sees fit to appeal, and to submit the question whether the trade or

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employment which he exercises thereon is a nuisance, or hurtful or injurious to the inhabitants or their estates, to a judicial trial and determination.

It seems to us that such a provision is not only not unreasonable, but, looking at the purpose of the statute and the object which it was designed to accomplish, is necessary and expedient to secure its effective operation. If, as preliminary to the exercise of any jurisdiction over the subject matter, the selectmen were required to give notice to all persons exercising offensive trades or employments within the limits of the town, of their intention to prohibit the continuance of them, it would follow necessarily that such persons would have a right to appear and object, and ask for a hearing and trial on the question whether the use of their property was hurtful or noxious, so as to fall within any of the classes contemplated by the statute. This would often lead to protracted examinations, which might occupy days or weeks. If in the mean time the alleged offensive and noisome trades might be carried on, great injury to health might be occasioned, and it would be impossible to prevent the evils which it was the manifest object of the statute promptly to suppress. *Case to stand for hearing.*

MIDDLESEX RAILROAD COMPANY *vs.* CITY OF CHARLESTOWN.

An incorporated street railroad company is not taxable for horses or other personal property used in and necessary for the prosecution of its business.

CONTRACT to recover back the amount of a tax upon the real and personal estate of the plaintiffs, paid by them to the defendants. The writ was dated January 28, 1863.

At the trial in the superior court, before *Allen*, C. J., there was evidence tending to prove the following facts: The plaintiffs are a street railroad company, incorporated by *St.* 1854, *c.* 434, and, after being duly organized, they proceeded to construct and lay down a railroad in Charlestown and Boston, as

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therein provided, and have since used the same for conveying passengers over it, and have procured horses and cars to such an extent as was necessary to meet the demands of the public. The assessors of Charlestown for 1862 assessed upon the plaintiffs a tax of $48, upon a valuation of $5000 of real estate, and a tax of $2697, upon a valuation of $281,000 of personal estate, consisting of horses, cars, omnibuses, sleighs, &c., including the track. The value of the horses, cars, omnibuses and sleighs was $39,935, and they were kept in Charlestown. All of these horses and cars were used exclusively in transporting passengers over the plaintiffs' railroad, and were necessary for that purpose; and all of the omnibuses and sleighs were necessary, under the rules and regulations established in Charlestown and Boston, to convey the plaintiffs' passengers from Charlestown to Boston and back when the plaintiffs were unable to use their railroad and cars by reason of their tracks being covered with snow; and they were used for no other purpose than as substitutes for the cars when the latter could not be used by reason of the snow, and for that purpose were necessary for the operation of the plaintiffs' road. The place of business of the plaintiffs was in Boston. The above taxes were duly committed for collection to the treasurer and collector of Charlestown, who, under Gen. Sts. *c.* 12, § 45, on or about the 1st of January 1863, issued and delivered his warrant, embracing the personal estate only, to a deputy sheriff for collection, who on the 24th of said January seized a quantity of current bank bills of the plaintiffs, sufficient to satisfy the tax upon the personal estate, and on the 11th of the following February paid the same into the city treasury. On the 16th of the following March the plaintiffs paid the tax upon the real estate under protest.

Upon these facts, in order to present the question of law, the chief justice ruled that the action could not be maintained, and directed a *pro forma* verdict for the defendants, which was returned accordingly; and the plaintiffs alleged exceptions.

L. Child & C. E. Powers, for the plaintiffs, cited *Worcester* v. *Western Railroad*, 4 Met. 564; *Wayland* v. *County Commissioners*, 4 Gray, 500; *Commonwealth* v. *Temple*, 14 Gray, 69;

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Charlestown v. *County Commissioners*, 1 Allen, 199; *Boston & Sandwich Glass Co.* v. *Boston*, 4 Met. 185; *Boston Water Power Co.* v. *Boston*, 9 Met. 199; *Preston* v. *Boston*, 12 Pick. 7; *Dunnell Manuf. Co.* v. *Pawtucket*, 7 Gray, 277; *St.* 1854, *c.* 434.

J. Q. A. Griffin, for the defendants. The tax upon the real estate cannot be recovered back in this action; nor can that upon the personal estate, if there was any item embraced in the taxation, for which the plaintiffs were properly assessed. *Bourne* v. *Boston*, 2 Gray, 494, and cases cited. *Bates* v. *Boston*, 5 Cush. 93. The omnibuses and sleighs were not owned or used by virtue of the plaintiffs' charter. As a corporation, they were only authorized to transport passengers in cars. When they used omnibuses or sleighs for this purpose, they were not acting under their charter; and for these, they were certainly taxable. Besides; the horses were taxable under Gen. Sts. *c.* 11, § 12, *cl.* 3. Horse railroad corporations are not exempt from taxation for their personal estate used in carrying on their business. They are required to make returns annually to the legislature of sums paid for taxes. Gen. Sts. *c.* 63, § 143, *pl.* 53. No intention on the part of the legislature to exempt them from taxation is discoverable in any of the general or special acts concerning them; and the reasons assigned by this court for exempting certain property of other corporations are not applicable to these corporations. *Worcester* v. *Western Railroad*, 4 Met. 564. *Boston & Maine Railroad* v. *Cambridge*, 8 Cush. 237. The action was prematurely brought. The cause of action did not accrue until the money had been received into the defendants' treasury.

Hoar, J. The question of the right of the plaintiffs to recover money which has been paid as a tax assessed upon their real estate, *eo nomine*, does not arise in this case, because the tax upon real estate of which they complain was not paid by them till after the commencement of the suit.

But it has been held, and is well settled, that real and personal estate are so far separate and distinct subjects of taxation, that, if a person is liable to taxation only upon one, he may recover in an action against the town money which he has been

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compelled to pay by reason of a tax illegally assessed upon the other. *Boston & Sandwich Glass Co.* v. *Boston*, 4 Met. 181. *Howe* v. *Boston*, 7 Cush. 273. *Lincoln* v. *Worcester*, 8 Cush. 55. If the plaintiffs were not taxable, therefore, for any personal property in Charlestown, they may maintain this suit. If they were rightfully taxed for any, however little, they cannot have a remedy in this form, for including in the assessment property for which they were not taxable; but the remedy must be by an application for an abatement. *Little* v. *Greenleaf*, 7 Mass. 236.

And we think it very clear that the plaintiffs were not taxable for any personal property in the city of Charlestown. They are a corporation established by law for the purpose of constructing and working a horse railroad. The corporation has no residence. Its stockholders are liable to taxation upon their shares in the towns where they dwell. The value of the personal property owned by the corporation is included as a subject of taxation in the value of the shares; as in the case of banks, insurance companies, manufacturing corporations, and other railroads.

The defendants rely upon the special provision in Gen. Sts. c. 11, § 12, *cl.* 3, that horses employed in vehicles for the transportation of passengers for hire shall be assessed to the owners in the places where they are kept. But a similar provision is found in the first clause of the same section, relating to stock in trade, including that employed in manufacturing or the mechanic arts in cities or towns within the state other than where the owners reside, which is to be assessed to the owners in the towns in which they hire or occupy manufactories, stores, shops, &c. This last provision was reënacted from *St.* 1839, *c.* 139, § 1; and in *Boston & Sandwich Glass Co.* v. *Boston*, it was held to have no application to the mode of taxing property held by corporate bodies. That decision is in principle precisely in point in the present case, and is decisive of it.

The plaintiffs were therefore entitled to recover the whole sum paid by them as a tax upon personal property, and their exception to the ruling that the action could not be maintained is sustained.

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Lorenzo Hemmer *vs.* Fanny W. Cooper.

An action for deceit in the sale of real estate cannot be sustained by proof of fraudulent misrepresentations as to the price paid for it by the vendor.

Tort for deceit in an exchange of real estate. At the trial in the superior court, before *Allen*, C. J., the plaintiff relied solely upon misrepresentations by the defendant as to the price paid by her for the land which she conveyed by way of exchange to the plaintiff; and the chief justice ruled that, upon this state of facts, the action could not be maintained, and directed a verdict for the defendant, which was accordingly rendered. The plaintiff alleged exceptions.

E. M. Bigelow, for the plaintiff, cited *Sandford* v. *Handy*, 23 Wend. 260; *Van Epps* v. *Harrison*, 5 Hill, (N. Y.) 63; *Page* v. *Parker*, 43 N. H. 369; *Hazard* v. *Irwin*, 18 Pick. 104–106.

H. J. Boardman & C. Blodgett, Jr., for the defendant.

Chapman, J. The representations of a vendor of real estate, to the vendee, as to the price which he paid for it, are to be regarded in the same light as representations respecting its value. A purchaser ought not to rely upon them; for it is settled that, even when they are false and uttered with a view to deceive, they furnish no ground of action. *Medbury* v. *Watson*, 6 Met. 246, and cases there cited. *Exceptions overruled.*

Caroline Jones *vs.* James Thompson.

If a woman who has made a complaint under the bastardy act neglects to prosecute the same, and the case is thereupon prosecuted by one of the officers named in Gen. Sts. c. 72, § 2, the supplementary complaint filed in the superior court must aver all the facts necessary to sustain the prosecution.

Such supplementary complaint may be amended.

If such complainant has taken out a warrant, and has omitted for six weeks to cause it to be returned, this court cannot say on exceptions that this was not a sufficient neglect to prosecute the case to authorize the prosecution of it by one of the officers named in Gen. Sts. c. 72, § 2, although such neglect is not otherwise shown, and the original complaint is undisposed of.

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COMPLAINT under Gen. Sts. *c.* 72, relating to the maintenance of bastard children, made by Henry B. Wheelwright, one of the alien commissioners. The complaint filed in the police court was dated April 27th 1863, and alleged that on the 11th of March 1863 Caroline Jones made a complaint charging the defendant with being the father of a bastard child with which she was pregnant, on which complaint a warrant was issued and delivered to Caroline, who neglected and refused to prosecute the complaint; and it prayed for a new warrant, which was accordingly issued, and the defendant was arrested, and gave bond for his appearance in the superior court. The said Wheelwright afterwards, by his attorney, filed a supplementary complaint in the superior court, setting forth all the former proceedings, and that Caroline was afterwards delivered of a bastard child, but not containing any direct averment that the defendant was the father of the child.

At the trial in the superior court, before *Putnam*, J., the defendant objected that this complaint could not be sustained, because the original complaint by Caroline remained undisposed of; that no evidence could be introduced to prove that the defendant was the father of the child, because the complaint contained no averment to that effect; and that there was no evidence of a refusal or neglect by Caroline to prosecute her complaint. The judge overruled all these objections, and ruled that the fact that her complaint had remained so long undisposed of in the police court was evidence of her refusal or neglect, upon which the police court must now be presumed to have acted.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

A. C. Clark, for the defendant.

J. G. Locke, for the complainant.

DEWEY, J. It is the well settled rule of law that the complaint filed in the superior court is the one upon which the defendant in a bastardy prosecution is tried. Such complaint must state all the facts necessary to charge the defendant as the father of the bastard child, and all facts necessary to sustain

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the proceedings against him under the statute. The complaint filed in the present case is defective, in that it does not directly allege those facts, but only alleges that the defendant was, in the original complaint before the police court, charged with being the father of the alleged bastard. It has no averment of its own of the truth or existence of that fact. The only issue presented by this complaint was, whether in the previous complaint the defendant had been thus charged, and not whether he was guilty of the acts charged.

This objection was taken to the complaint in due season, and is therefore a subject of exception. The verdict must for this cause be set aside and a new trial had, when it will be competent for the court to grant leave to amend the complaint, and have the case submitted to the jury on the amended complaint.

We see no objection to the prosecution of the case, upon the ground that it was not sufficiently shown that Caroline Jones had neglected to prosecute it. *Exceptions sustained*

EBENEZER CURTICE *vs.* WILLIAM B. BOTHAMLY.

An action of contract upon a recognizance need not be brought in the same court in which the recognizance is entered of record.

If a married woman appeals from a judgment of a police court against her, in a personal action, and enters into a recognizance to prosecute her appeal, the recognizance is valid, although it shows upon its face that she was a married woman, and does not show facts sufficient to establish her liability in the action.

The surety in a recognizance given to prosecute an appeal from a judgment of a police court is not discharged by the plaintiff's subsequent release of his attachment upon the writ.

CONTRACT upon a recognizance entered into by Eliza Stone, wife of William Stone, as principal, and the defendant as surety, with condition that she should prosecute with effect an appeal from a judgment rendered by the police court of Boston in favor of the plaintiff against her, in a personal action, and pay all such costs as might arise after the appeal.

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The action was originally brought in the police court, and came into the superior court on appeal; and it was there agreed that in the action in which the recognizance was taken the real estate of said Eliza was attached, to an amount sufficient to satisfy any judgment which the plaintiff could obtain, and that he subsequently discharged the attachment, upon the payment by a purchaser of the real estate of a portion of the amount of the judgment, which payment was applied by the plaintiff in satisfaction of his debt, and the costs which accrued before the taking of the recognizance.

Upon these facts, judgment was rendered for the plaintiff; and the defendant appealed to this court.

G. E. Betton, for the defendant.

A. Cottrell, for the plaintiff.

CHAPMAN, J. This is an action of contract upon a recognizance entered into by the defendant as surety of one Eliza Stone, in the police court. Its condition was, that she should prosecute an appeal taken by her from a judgment rendered against her in that court, in an action in favor of the plaintiff, and pay all such costs as might arise after the appeal. The appeal and recognizance were duly entered in the superior court. This action was brought in the police court, and the defendant contends that the court had not jurisdiction of the cause; but that it ought to have been brought in the superior court, where the recognizance is of record. The authorities cited by him are not in point. They sustain the position that a *scire facias* on a recognizance must be brought in the court where it is of record. But there is no doubt that an action of contract also lies upon a recognizance. Police courts have the same jurisdiction with justices of the peace; and it includes all actions of contract where the damages demanded do not exceed one hundred dollars. Gen. Sts. *c.* 120, § 2. The language of the statute, therefore, includes the present action, the *ad damnum* not exceeding the sum named. We can see no objection to this jurisdiction; for the police court must render the same judgment in the action that the superior court would have done.

The defendant further contends that the recognizance is void,

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because it appears on its face that the said Eliza Stone was a married woman, and that the action was a personal action. Therefore he contends that, as a married woman is not liable to such actions, except in special cases, and as the recognizance does not show that she was liable in the action brought against her, the jurisdiction of the court does not appear. But the question whether a married woman is liable upon a particular contract, or for a particular tort, is not a question of jurisdiction. Her plea of coverture is not to the jurisdiction, but to the action. In the present case, it does not even appear that she set up such a defence. The liability of married women upon their contracts is made by our recent statutes very extensive. It includes all debts due from them before marriage, and all debts contracted in their separate business and relative to their separate property.

But the defence principally relied on is, that the officer had attached property on the writ, and the plaintiff released the attachment. It is contended that such a release of a security releases the surety. This is an attempt to apply to a recognizance of this character the doctrines that are established in respect to commercial guaranties. No authority is cited in behalf of the defendant to show that such an application of these doctrines has ever been made, and we can see no reason for thus extending them.

The appellant in an action, when he appeals from the judgment, selects his surety, and the magistrate decides whether he shall be accepted. The appellee has no voice in the matter, and enters into no obligation to the surety, express or implied. He cannot be held as contracting with the surety that he will preserve his attachment, nor can he be regarded as a trustee of the surety to preserve the attached property for his indemnity. The recognizance is merely an independent security, which the law gives him when his adversary appeals from the judgment which he has obtained, and he is at liberty to waive or release his attachment and rely upon the recognizance in whole or in part, as he may see fit. *Judgment for the plaintiff.*

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JONATHAN I. BOWDITCH *vs.* LOUISA M. ANDREW & others.

A testator who died leaving a wife and several children devised the residue of his estate, real and personal, in trust, to pay a certain sum annually to his wife, for her sole and exclusive use, and to pay over from time to time to his wife "such sums of money annually as to my wife and the said trustee shall seem to be necessary for the maintenance of my family, and the support and education of my children;" and after her death to divide the trust fund equally among all his children, and the representatives of any deceased child or children, and to pay over and convey the same to them as follows: the portions of his sons to them as they should severally become of age; and the income of the portions of his daughters to them during their lives, and after their deaths the principal of each to her heirs at law. He also directed the trustee to retain the dwelling-house for the use and occupation of his widow and family. All of the children afterwards died without issue; the dwelling-house was sold; and the testator's wife ceased to keep house. *Held*, that a termination of the trust might be decreed; that the widow was no longer entitled to receive the sum directed to be paid to her for the maintenance of the family; and that the children took a vested interest under the will.

BILL IN EQUITY, in the nature of a bill of interpleader, brought by the trustee under the will of John F. Andrew, to obtain instructions as to the execution of his trust.

It appeared from the bill and answers that the testator died in December 1847, leaving a wife and four children, and a will, by which, after certain bequests to his wife, he devised the residue of his estate, both real and personal, to the plaintiff in trust, to receive the income, dividends and proceeds of the same, and dispose thereof as follows: "Out of said dividends, income or proceeds, to pay over to my said wife Louisa, annually, a sum equal to the legal interest on the sum of twenty-five thousand dollars, during the lifetime of my said wife, and for her sole and exclusive use and benefit;" "to pay over, from time to time, to my said wife Louisa such sums of money annually as to my wife and the said trustee shall seem to be necessary for the maintenance of my family, and the support and education of my children; and after the death of my said wife Louisa the said trustee shall retain and hold the whole of the aforesaid rest, residue and remainder of my estate on the trusts and subject to the conditions following, viz: to divide the same equally among all my children, and the representatives of any deceased child or children, and to pay over and convey the same to my

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said children, their representatives or heirs at law, in the manner following, viz: the portions of personal estate, and of the real estate, if the same shall not have been sold by said trustee, of such of my sons as shall be of age at the death of my wife, shall be paid over and conveyed to them severally, as soon as may be after the death of my said wife, by the said trustee; and to such of my sons as shall not be of age at the death of my said wife, their portions shall be paid over and conveyed by said trustee as they severally become of age; the portions of real and personal estate of my daughters shall be held and retained by said trustee, after the death of my said wife, upon the trust to receive the income of the said portions, and pay over said income to my said daughters, in the proportion to which they are severally entitled, during their lifetime; and after their death to pay over and convey the portion of each of them to their heirs at law."

By a codicil to his will, the testator directed the trustee, after providing for the above payments to his widow, for the purposes mentioned, if it should appear that a sufficient amount was left therefor, to pay to each of his sons as he should become of age, and to each of his daughters as she should become of age or be married, the sum of five thousand dollars; or, in case it should appear that the amount of property left was insufficient to justify the payment of so large a sum, then he directed the payment, to each of his sons and daughters as aforesaid, of such sum less than five thousand dollars as to his trustee should seem reasonable and proper.

By a second codicil, the testator added the following provision, amongst others: "It is my will, and I do hereby direct, that in case my widow and family shall be desirous to possess and occupy the dwelling-house of which I am part owner, and in which I now reside, then and in that case I hereby direct my executor and trustee not to sell or convey any part of said dwelling-house, but to retain the same for the use and occupation of my widow and family; and if my widow and family should desire to occupy the whole of the house, as I now do, then I direct my executor and trustee aforesaid to hire the other part of the

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said dwelling-house at a proper and reasonable rent, if the same can be so obtained, so that my widow and family may occupy the whole of the said dwelling-house, as I now occupy it, as long as it may be convenient and desirable so to do."

Three of the testator's children died under age and unmarried; and the fourth, Forrester Andrew, died testate, after becoming of age, leaving no property except his interest in his father's estate. The only heir at law of John F. Andrew, living at the time of Forrester Andrew's death, was Isaac W. Andrew. The dwelling-house occupied by John F. Andrew has been sold, and his widow, after the sale, ceased to keep house, and has ever since lived as a boarder with strangers.

The parties defendant were the testator's widow, the legatees under Forrester Andrew's will, and Isaac W. Andrew. The case was reserved by the chief justice for the determination of the whole court.

C. A. Welch, for Louisa M. Andrew.

S. H. Phillips, for I. W. Andrew.

H. Gray, Jr., for legatees under Forrester Andrew's will.

Hoar, J. The power and duty of this court, as a court of equity, to decree the termination of a trust, and a conveyance of the trust estate to the parties beneficially interested in it, when the whole objects and purposes of the trust have been accomplished, the interests created under it have all vested, the parties request it, and the trustee consents, cannot be doubted. *Smith* v. *Harrington*, 4 Allen, 566.

The case then presents but two questions: first, whether the direction to the trustee to pay over to the widow of the testator from time to time such parts of the income of his estate as should seem to her and the trustee necessary for the maintenance of his family and the support and education of his children has become inoperative by the death of all the children, the sale of the house in which the family resided, and the widow's ceasing to keep house for herself; and secondly, whether the equitable interest which was given to the children was a vested or contingent interest.

The word "family" may, undoubtedly, sometimes be so used

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as to include a wife as well as children. Indeed, it would usually be so understood, if there were nothing to show that the contrary were intended. And we think the whole language of the will shows that it was meant to include the wife and children, while they should live together and thus constitute a family. The will made no other provision for the children during the life of their mother than that which was contained in this clause. A very considerable amount of property was given to the widow, for her sole and exclusive use and benefit. But the testator seems to have contemplated that during the whole life of his widow there would be a household to be maintained. His children were young, and for a considerable period, at least, would be likely to live with their mother, and be dependent upon her. And we think it was in reference to this probability that he used the phrase "maintenance of my family," in addition to "the support and education of my children." The first had reference to the expenditures necessary for the joint maintenance of those who should live together collectively; and the second was intended rather to provide for the children separately, as they should cease to continue members of the family, on their marriage, or leaving home for purposes of education or settlement in life. This view is confirmed by the language of the codicils, especially of the second codicil, in which the use of the dwelling-house is given to his "widow and family." And after the death of all the children without issue, the sale of the dwelling-house, and the ceasing to keep house by the widow, we do not think she can be regarded as constituting the "family," for whose support the provision in the will was designed.

The remaining question is not attended with any difficulty. The whole equitable interest in the residue of the estate undoubtedly vested in the children, subject to the discretionary disposition of the income during the life of their mother; the possession only being postponed till the death of the widow. The principle is fully stated in the leading case of *Shattuck* v. *Stedman*, 2 Pick. 468, and has been followed in many other cases cited in argument. *Winslow* v. *Goodwin*, 7 Met. 381. *Childs* v. *Russell*, 11 Met. 16. *Furness* v. *Fox*, 1 Cush. 134.

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Wight v. *Shaw*, 5 Cush. 60. *Eldridge* v. *Eldridge*, 9 Cush. 516. *Barton* v. *Bigelow*, 4 Gray, 353.

The *dictum* in *Dingley* v. *Dingley*, 5 Mass. 535, was the ground of the very imperfectly reported decision in *Denny* v. *Allen*, 1 Pick. 147, and was stated as one of the reasons for the decision in *Emerson* v. *Cutler*, 14 Pick. 108. But *Denny* v. *Allen* was questioned in *Winslow* v. *Goodwin*, 7 Met. 381, and in *Wight* v. *Shaw*, 5 Cush. 60, and can no longer be regarded as an authority; and *Emerson* v. *Cutler* was decided correctly upon another ground. The whole weight of authority in this commonwealth and in England is clearly in favor of treating the legacies as vested.

A decree is therefore to be entered to terminate the trust, and to authorize the trustee to pay over the residue to the personal representatives of the deceased children, in order that, if there are no claims of creditors, three eighths may go to the widow, and five eighths to the uses of the will of Forrester Andrew, the survivor of the children of the testator. Costs are to be allowed from the fund. *Decree accordingly.*

MARY G. ROGERS *vs.* OTIS DANIELL & others.

If a testator by his will, executed in his last sickness, creates a fund and directs the trustees thereof to pay over to each of his children a certain sum, but provides that "any legal debt due from either of said children to my estate at the time of my decease shall first be deducted by said trustees, and the balance only be paid over to such child as aforesaid," a married daughter is entitled to receive the whole sum so directed to be paid, without deduction, although she had signed notes with her husband to her father for moneys furnished to her husband by her father, which the latter held at the time of the execution of the will and of his death, and upon which he had collected interest in his lifetime, and which he included in a memorandum of his assets, and although for other sums advanced by him to her and to others of his children he had taken no notes and made no charge, and no debts were due to him from any of his children, unless these notes and a similar one executed by another married daughter and her husband are to be regarded as such.

If a testator directs the trustees of a fund created by his will to pay over to each of his children a certain sum, an action at law may be maintained by one of the children to recover the same, if the fund is sufficient, and the only matter in dispute is whether the legacy is subject to certain deductions under another clause of the will.

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Rogers v. Daniell & others.

CONTRACT against trustees appointed by the will of Moses Grant, to recover a legacy.

It was agreed that Moses Grant, on the 6th of April 1861, in his last illness, and about three and a half months before his death, executed his will, which contained the following provisions, amongst others:

"Fourth. I give and bequeath unto Otis Daniell, Nathaniel Walker and Moses P. Grant, all of said Boston, and their heirs and assigns, the sum of seventy-five thousand dollars, but in trust, nevertheless, to be held, managed and disposed of as follows, to wit: to safely invest the same (or so much thereof as shall not at any time be paid out) for the benefit of my children here named, to wit: Moses P. Grant, Mary G. Rogers, wife of George H. Rogers, Susan W. S. Walker, wife of Nathaniel Walker, Francis E. Grant and Sarah B. Grant, who may survive me, and the issue of such of them as may have deceased, by right of representation; and to pay over to each of such children, or their respective issue, as aforesaid, the sum of fifteen thousand dollars, or part thereof at a time, as and whenever it shall be demanded in writing of said trustees. Provided, however, that any legal debt due from either of said children to my estate at the time of my decease, shall first be deducted by said trustees, and the balance only be invested for the benefit of, or paid over to, such child as aforesaid."

The testator left sufficient assets for the payment of his debts and legacies, and the trustees received from the executors the above named sum of seventy-five thousand dollars. He also left the five children above named, and the issue of one deceased child, for whom provision was made in another part of the will. The plaintiff was married in 1850, and has since lived with her husband in Baltimore, Maryland. During the testator's life he supported his unmarried daughters, and made to them an allowance, for which he made no charge. Mr. Rogers after his marriage was in embarrassed circumstances, and failed in business twice, and Mrs. Rogers received money from her father, not charged against her, and of which he preserved no evidence. He also paid certain sums, amounting in all to $9800, for which

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he took notes, dated respectively in 1854, 1856 and 1859, signed by George H. Rogers and Mary G. Rogers, most of which were made payable jointly and severally, and all upon demand with interest. Upon several of these notes an indorsement of interest paid had been entered. This interest was paid by Mr. Rogers. The money for which the first of these notes was given was paid chiefly to Mr. Rogers, and was chiefly applied to family expenses. The other notes were given for money used by Mr. Rogers in his business. The notes were all executed and dated in Baltimore, and no place of payment was named in them. The testator also paid $2000 to his daughter Susan W. S. Walker, at or after her marriage, for which he took a note signed by herself and her husband, jointly and severally, which was unpaid at the time of his death. No other pecuniary transactions between him and his daughters are known; and there is no evidence of any debt due from his son at the time of his death, or of the making of the will. The above notes were included by him in a memorandum of his assets left at his death. The daughters had no separate estate, till his death. A due demand was made by the plaintiff, but the trustees declined to pay any more than the balance, after deducting the amounts of the several notes signed by the plaintiff.

Upon these facts, which were agreed to, so far as the same would be competent evidence, the case was reserved by *Merrick*, J. for the determination of the whole court.

D. H. Mason & F. W. Hurd, for the plaintiff. The notes were not legal debts, under the laws of Maryland or of Massachusetts. *Burton* v. *Marshall*, 4 Gill, 487. *Griffith* v. *Clarke*, 18 Maryland, 457. *Koontz* v. *Nabb*, 16 Maryland, 549. *Parker* v. *Simonds*, 1 Allen, 258. A legal debt is a debt which can be enforced at law. The intent of the testator must be ascertained from his words. Courts are not to speculate as to the sense in which a testator used language. Wigram on Wills, 17. *Cole* v. *Goble*, 13 C. B. 445. *Winder* v. *Lawes*, 7 Ad. & El. 195. *Clarke* v. *Cordis*, 4 Allen, 480. There was a possibility that legal debts might exist at the time of his death. The intent to provide equally for his children is consistent with the construction

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contended for. The executors still hold the notes against the plaintiff's husband, for the money lent to him. But whatever may have been the actual intent of the testator, the words used by him are susceptible of but one meaning, and must be taken as they stand. *Tucker* v. *Seaman's Aid Society*, 7 Met. 188. *Brown* v. *Saltonstall*, 3 Met. 423.

This action may be maintained, under Gen. Sts. *c.* 113, § 3, even if the plaintiff's remedy is in equity. See *Currier* v. *Howard*, 14 Gray, 511; *Irvin* v. *Gregory*, 13 Gray, 215; *Scovill* v. *Kinsley*, Ib. 5. But independently of the statute, the action would lie. *Buttrick* v. *King*, 7 Met. 20. *Arms* v. *Ashley*, 4 Pick. 71.

F. E. Parker, for the defendants. The testator designed to make the shares of his children equal, and he must have considered each of his children to be capable of contracting a legal debt. It is apparent that he considered the notes of the plaintiff legal debts, because there were no other outstanding pecuniary matters between him and his children, except the similar transaction with Mrs. Walker; and there could have been no expectation of further pecuniary dealings with his children in his lifetime. He took and preserved these notes, the most of which bore her separate promise, collected interest upon them, took and preserved another similar note from the other daughter, included them all in his memorandum of assets, and kept no account of his other payments to them. He thus clearly distinguished between payments which he regarded as gifts and those which he regarded as loans. It is no answer to this to say that these notes were not in fact legal debts. If he mistook the law, such mistake will not stand in the way of his plain intention. *Haven* v. *Foster*, 9 Pick. 112. It does not appear that he had made any previous will; and if not, these payments would have been treated as advancements. Rev. Sts. *c.* 61, § 9. *Hartwell* v. *Rice*, 1 Gray, 593. *Paine* v. *Parsons*, 14 Pick. 318. And in leaving a will, he took pains to preserve what he had been accustomed to consider as the most legal form of a debt.

The plaintiff's remedy, if any, is in equity. This is a testamentary trust, not yet executed. No final account has been

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stated. See Story on Eq. §§ 962, 975; Hill on Trustees, 518; 1 Spence on Eq. 576; Lewin on Trusts, 20. An action at law cannot by amendment be changed into a bill in equity. *Hayward* v. *Hapgood*, 4 Gray, 439. *Darling* v. *Roarty*, 5 Gray, 71. In an action at law, the trustee has no opportunity to obtain equitable allowance on an account, or to settle his compensation, or to deduct losses incurred without his fault.

Dewey, J. The plaintiff seeks to recover of the defendants payment of $15,000, alleged to be due to her from them as trustees under the will of Moses Grant. The defendants insist that the whole sum demanded is not due to her, under the provisions of the will, but that a large sum is to be deducted from the sum of $15,000, on account of the indebtedness of the plaintiff to the estate of the testator at the time of his decease. They rely upon the clause of the will following that of the gift of $15,000, to be paid to her whenever it shall be demanded in writing, "provided, however, that any legal debt due from either of said children to my estate at the time of my decease shall first be deducted by said trustees, and the balance only paid over to such child." The existence of such legal debt due to the estate is of course to be shown by the defendants. Such indebtedness is attempted to be established by the production of several promissory notes signed by the plaintiff and her husband, George H. Rogers, all executed at Baltimore, and at various periods from 1854 to 1859. Upon some of these notes interest had been indorsed, and they were all included in a memorandum of assets left by the testator. The inquiry is, whether these notes constitute "legal debts" due from the plaintiff to the estate of Moses Grant, or can properly be treated as debts to be deducted from the $15,000 payable to the plaintiff.

The plaintiff was, at the time of the execution of these notes, a married woman, living with her husband in Baltimore, and having no separate estate of her own. It appears that, by the law of Maryland, such signatures of notes by a married woman would create no legal obligation on her part. The contracts having been there entered into, we suppose that the position

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taken by the plaintiff is correct, that their validity and her capacity to contract must be decided in reference to the laws of that state. But it seems, also, that the notes would be equally invalid, as to Mary G. Rogers, under the laws of Massachusetts. They were not contracts in respect to any separate property, trade or business of the wife, and she held no separate estate, and none was charged with any legal or equitable liability for the payment of these notes. They were valid contracts on the part of her husband, and might be deemed assets of the estate of Moses Grant, but they were not legal debts of Mrs. Rogers.

Indeed, the whole question here seems to be whether, by a latitudinarian construction of the phrase "legal debt," the court cannot say that these notes are embraced within its terms. In support of this view, the argument is pressed upon us that the surrounding circumstances all tend to show that such must have been the intention of the testator; and that no other legal debts of his children are known to exist, to which these words could refer. It is said that the intention of the testator is to govern. That is true; but such intention is to be found in the words of the will, where the same are clearly stated. The phrase "legal debt" must certainly mean a debt which can be enforced in a court of law. These promissory notes signed by the plaintiff could not be enforced in a court of law against her, nor are they contracts for which she would be liable in a court of equity. The testator may have had a different view of their legal effect; but, having used plain and direct words, we must understand him in the sense which his language imports. *Barrus* v. *Kirkland*, 8 Gray, 512.

It would have been very easy for the testator to refer to these notes, and direct that they should be deducted from the portion given to the plaintiff. But as he has not done so, and has used language which does not include them as subjects of deduction, we must give to the words of the will their plain and natural meaning. The result is, therefore, that these notes are not "legal debts" of Mrs. Rogers, and are not to be deducted from the $15,000 legacy.

The court are also of opinion that, upon the peculiar facts of

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the present case, no sufficient objection exists to the plaintiff's right to recover in the present form of action the sum that may be due to her under the fourth clause in the will. As a general rule, a claim against trustees must be enforced by a suit in equity. The character of trusts, the various persons to be made parties, and the proper adjustment of the matters connected with trusts, alike point to such a course of proceeding, rather than to an action at law. But to this general rule there are exceptions, as in the cases of *Buttrick* v. *King*, 7 Met. 20, and *Arms* v. *Ashley*, 4 Pick. 71.

The only question here in controversy is, that of the legal effect of the provision in the will of Mr. Grant, requiring a deduction, from the amount given in trust for the plaintiff, of any legal debts due from the plaintiff to the testator at the time of his decease, and whether, under this clause in the will, certain promissory notes purporting to be signed by the plaintiff and her husband should be deducted from her legacy. The defendants admit the holding of the money placed in trust by the testator for the benefit of the plaintiff, and payable to her whenever she should demand it in writing. They admit the demand, and aver their readiness and an offer to pay to the plaintiff what they allege is the balance remaining of said $15,000, after deducting the amount of the promissory notes. There is no suggestion that the funds placed in the hands of the trustees have depreciated, or that the rights of other *cestuis que trust* under the same provisions will be injuriously affected by a recovery in the present action.

This case is also before this court upon a statement of facts, which form of presenting it clearly waives all technical objections to the present declaration, and would only raise the question whether in any form of an action at law the plaintiff would be entitled to recover this legacy.

Judgment for the plaintiff.

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Frances Ann Lane *vs.* Jonas H. Lane.

A testator, who died leaving a wife and three children, by his will directed that his personal property should be applied to the payment of his debts and the removal of incumbrances upon his real estate; "that my property, when thus consolidated in real estate, may thus remain during the lifetime of my wife and of each of my children, and, at the decease of the last surviving one of them, that said property may then [after certain specific legacies] be divided between my surviving legal heirs, each receiving an equal portion of the same." By a codicil, he directed that the income of his real estate should be divided into four equal parts, of which one should quarter-yearly be given to his wife and one to each of his children; that after five years from the date of his decease, at any time when his legal heirs should unanimously agree, his property might be divided into equal shares, not disposing of the real estate any further than necessary, but retaining it in the possession of his heirs, one share for his wife and one for each child, and being thus divided should be placed in the hands of trustees, in trust for his wife and children. The widow waived the provisions of the will in her behalf, and the specific legacies were paid or secured. *Held*, that the children took a vested interest in the estate, in fee simple.

Bill in equity by the executrix of the will of Jonas H. Lane, praying for the instructions of this court as to the execution of the said will.

It appeared that the testator died on the 5th of September 1861, leaving the plaintiff as his widow, and three children, and a will executed in November 1850, containing the following directions:

"2d. That so much of my real estate as can be retained unincumbered should not be sold; and that all property to me belonging, all stocks, notes, bills, &c. due to me, may be collected with all reasonable dispatch, and converted into money; and by these means, and in such ways, as far as can be done, that all incumbrances upon my real estate may be liquidated and removed.

"3d. That my property, when thus consolidated in real estate, may thus remain during the lifetime of my beloved wife, Frances Ann Lane, and during the lifetime of each of my beloved children, Eliza Wait Lane, Jonas Henry Lane, and Charlotte Taylor Lane; and, at the decease of the last surviving one of the before mentioned wife and children, that said property may then be divided in the following manner: viz., to the American Board of Commissioners for Foreign Missions, five hundred

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dollars; to the American Home Missionary Society, five hundred dollars; to the First Evangelical Congregational Church and Society in Lancaster, Massachusetts, five hundred dollars; and the remainder of said property shall be divided between my surviving legal heirs, each receiving an equal portion of the same.

"4th. That my beloved wife, Frances Ann Lane, have, instead of her dower in my estate, the net income of all my real estate, (consolidated as before described,) after paying all taxes and insurance, and all other charges upon the same, so long as she remains unmarried and my widow, to be used to the best of her own discretion, for her own support, and for the support and education and future benefit of our three children, during the life of them all."

The will contained numerous further provisions, in case of the second marriage of the testator's widow, and the marriage or pecuniary embarrassment of his children; and gave to his children certain specific legacies.

In December 1857, he made a codicil to the will, which contained the following provisions:

"First. Whereas my daughter Eliza is married, and my son is twenty-one years old on the 4th of January 1858; instead of the net income of all my real estate (see section 4 of will) passing into the hands of my beloved wife, to be used at her best discretion for the support and education of my children, I do hereby will that said net income be divided into four equal parts every quarter-yearly; of which, every quarter-yearly, one shall be given to my beloved wife, and one to each of my dear children, for their own respective and personal use.

"Second. After five years from the day of my decease, at any time when my legal heirs shall unanimously agree, my property may be divided into equal shares, not disposing of or selling my real estate any farther than is absolutely necessary in said division, but retaining it in the possession of my heirs; viz., if my wife be living, and each of my children be living, then let there be four equal shares; if my wife be not living, or if either of my children have died, leaving no legal heirs, then let the number of shares be

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one share for each of my surviving children, and one share for each of my children who have died leaving legal heirs. My will is that the property thus divided shall be placed in the hands of trustees, of abundant responsibility and safe judgment, for the care and management of the same, in trust for my beloved wife and for my dear children. Said trustees shall pay over, in quarter-yearly payments, the entire regular net income from the same, and so much more of each respective share as shall be needed for their comfortable support, to the ones entitled to the same; provided, that in any case the ones (or their families) thus entitled to said shares shall, from misfortune of any kind, be in circumstances of need, my will is that this provision be for the personal benefit of those, and of their families, to whom it is given for their maintenance and comfortable support; and that it shall not in any way be liable for or used in the discharge of their debts, or those of any one else; neither shall they, or any one, have power to alienate or sell the same, excepting so far as to meet the necessary daily expenses of the returning necessary daily wants of the families of the ones entitled thereto, whenever the regular income from the same is not sufficient therefor.

"Said payments shall be made to said individuals personally, and to them only, and in money, except when the trustees shall deem it for the best interests of said heirs to pay their board, or to purchase for and give over to them all the necessaries of life which they may need, taking therefor their single receipt. Let not the said trustees, in any way whatever, abuse this power."

The codicil contained a further recommendation as to benevolence, a direction as to the character of the investments of his estate, and advice as to partnerships and an early withdrawal from business.

The case was reserved by the chief justice for the determination of the whole court.

T. H. Russell, for the plaintiff.

H. W. Suter, for the defendant.

Hoar, J. The legacies from this estate having been paid or secured to the satisfaction of the several legatees, and the widow

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having waived her rights under the will, the question presented for our decision is simply this: What estate was given by the will and codicil to the testator's children? We think the testator intended to give the property to his children as a vested interest in fee, but wished to prevent a sale or conveyance by them of the interest thus given; inconsistent purposes, which the law cannot carry into effect. Under the codicil we cannot find a trust by implication directly created, the words being apt and sufficient to vest a present interest; and the authority to create a trust after five years, if the parties in interest should elect, excluding the idea that any trust estate was to subsist in the mean time. The wishes of the testator that his real estate should be kept undivided, and as to the appointment of trustees, so far as expressed in the will, can only be regarded, consistently with the rules of law, as a recommendation, of the same character and weight as the other pieces of advice to his children which accompany his testamentary provisions. The executrix has therefore no interest in the estate as trustee, and the children take it, after payment of debts and legacies, as a vested estate in fee simple. *Decree accordingly.*

JAMES S. WIGGIN *vs.* BRADLEY N. CUMINGS.

A member of a firm which consists of more than two persons is liable to his partners jointly for a sum which, upon settlement, he is found to have withdrawn from the joint funds in excess of his share; and one of them cannot maintain an action therefor in his own name alone, although he has an assignment of all the right and interest of his associates in the assets of the firm.

CONTRACT brought by one member of a firm against his partner to recover a balance due from the defendant to the firm.

An auditor to whom the case was referred found that the plaintiff, the defendant, and one Robinson composed the firm, which was dissolved in October 1859; and that in January 1860 the defendant and Robinson assigned to the plaintiff all their right and interest in the partnership assets. The plaintiff als

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offered to prove to the auditor that at the time of the dissolution the defendant was a debtor to the firm in a large sum of money which he had withdrawn from the common fund; and that before the commencement of this action all the debts due from the firm, and all the debts due to them except the present one had been paid. By agreement of parties, the auditor, being of opinion that the action could not be maintained upon the facts proved and offered to be proved, reported the facts to this court; and the case was reserved by *Merrick*, J. for the determination of the whole court.

C. B. Goodrich, *D. Peabody & A. J. Robinson*, for the plaintiff, cited *Sikes* v. *Work*, 6 Gray, 433; *Dickinson* v. *Granger*, 18 Pick. 317; *Brinley* v. *Kupfer*, 6 Pick. 179; *Fanning* v. *Chadwick*, 3 Pick. 420; *Wilby* v. *Phinney*, 15 Mass. 121; *Bond* v. *Hays*, 12 Mass. 34.

G. A. Somerby, for the defendant.

Bigelow, C. J. There is a nonjoinder of a plaintiff in this action, which is a good defence in bar. The indebtment of one copartner for an excess of money withdrawn by him over and above his share or proportion of the joint funds is due to the other copartners jointly, where the firm consists of more than two persons, and not to them or either of them severally. The money, in such case, is taken from a joint fund which belonged to the other copartners, and the promise which the law implies in such case is a joint promise to the owners of the fund. No doubt, according to the well settled doctrine in this commonwealth, if all the debts and liabilities of a firm are paid, and its affairs are finally closed and settled, an action may be maintained by one or more copartners to recover a balance which may be due from another copartner for money or property withdrawn by him in excess of his proportion of the joint assets. The partnership transactions, under such a state of facts, have resulted in a debt, to recover which a suit at law is an adequate and complete remedy. But the action can be maintained only in the names of those to whom such debt is due. If the firm has consisted of three, and one of them on a final settlement is found indebted for an excess of joint funds withdrawn by him

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the debt is due to the two other copartners jointly; and they can recover it in a suit at law only by an action in their joint names. Nor is it at all material that one of these two has assigned to the other his share or proportion of the amount due from the third copartner. It is but the assignment of a chose in action, and, unless an express promise by the third copartner to pay the whole amount to the assignee is proved, the action to recover it must be in the name of the assignor as well as of the assignee. The assignment gives the right to use the assignor's name in bringing the suit, but it does not sever the promise or authorize the assignee to sue in his own name only.

Judgment for the defendant.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE SUFFOLK BANK *vs.* THE PRESIDENT, DIRECTORS AND COMPANY OF THE LOWELL BANK.

In an action against a bank to recover the penalty provided by Rev. Sts. c. 36, § 29, for delaying payment of its bills, it is not necessary to set out copies of the bills in the declaration.

ACTION brought in this court, containing counts in contract and in tort, to recover the penalty provided by Rev. Sts. c. 36, § 29, for a refusal by the defendants' officers to pay, in gold or silver money, bills issued by the defendants. The counts were all substantially in the same form, and one of them was as follows:

"And the plaintiffs say the defendants made and issued bank bills of their bank to the amount of thirty thousand dollars; and the plaintiffs were the holders of the same, and, on the twenty-fourth day of September last, presented the same for payment at the banking-house of the defendants, at their usual place of business, and in their usual hours of business, and then and there requested payment of said bills in gold or silver money; and the defendants' officers then and there refused

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payment thereof in gold or silver money, and continued so to refuse until the twenty-fourth day of February last, by means of which, and of the law and statute in such cases made and provided, the defendants became liable to pay damages at the rate of twenty-four per cent. a year for the time during which such payment was refused, from the said twenty-fourth day of September to said twenty-fourth day of February."

The defendants filed the following demurrer:

"And now the defendants demur to the plaintiffs' amended declaration, because no cause of action is therein set forth substantially in compliance with the rules of law, in this:

"Because the substantive facts necessary to constitute the cause of action are not stated with substantial certainty.

"Because it does not set forth the bills alleged to have been presented, or copies of them, or give any reason why the same are not set forth.

"And because said declaration is in other respects insufficient."

The case was reserved for the determination of the whole court.

C. B. Goodrich, for the defendants, cited *Bullard* v. *Bell*, 1 Mason, 243; *Churchill* v. *Merchants' Bank*, 19 Pick. 532.

P. W. Chandler & G. O. Shattuck, for the plaintiffs.

CHAPMAN, J. The defendants demur to the plaintiffs' declaration, and assign their causes of demurrer pursuant to Gen. Sts. *c.* 129, § 12. One of the causes of demurrer which the statute authorizes is, "that the declaration, or some count thereof, as the case may be, does not state a legal cause of action substantially in accordance with the rules contained in this chapter." But in setting forth such a cause of demurrer the party is required to go further. "The particulars in which the alleged defect consists shall be specially pointed out." Under this provision it has been decided that the party must be confined to the causes of demurrer specified by him, although the declaration may be defective on grounds not specified. *Washington* v. *Eames*, 6 Allen, 417.

The only defect which the defendants' demurrer specifically points out is the following: "Because it [the declaration] does

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not set forth the bills alleged to have been presented, or copies of them, or give any reason why the same are not set forth." All that precedes this statement must be regarded as merely introductory, for it does not of itself specifically point out any defect.

But the statute does not make it necessary to set forth the bills or copies of them, or give any reason why they are not set forth. The Gen. Sts. *c.* 129, § 2, *cl.* 9, only require that written instruments, except policies of insurance, shall be declared on "by setting out a copy, or such part as is relied on, or the legal effect thereof, with proper averments to describe the cause of action." So that a declaration may be good, though it does not set forth the instrument declared on, nor a copy of it, nor give any reason why the same are not set forth, provided it sets forth the legal effect with proper averments. Whether the declaration in this case properly sets forth the legal effect of the bills declared on, with proper averments, cannot be considered under the present demurrer, because no defect of this character is specifically pointed out. The pleader has merely pointed out as a defect the want of allegations that it is not necessary to make.

Demurrer overruled.

WALBRIDGE A. FIELD *vs.* JAMES CRAIG.

If two tenants in common of personal property have used the same in the prosecution of business, under an agreement as to the compensation of one of them, who was "to superintend the establishment," and who survives the other, the administrator of the deceased tenant in common may maintain a bill in equity to compel the survivor to exhibit an account of the transactions under said agreement, and of the manner in which the business was carried on.

BILL IN EQUITY by the administrator of the estate of Loring Norcross, setting forth, among other things, that in September or October 1860 the said Norcross, having been previously connected with the defendant in the business of printing and dyeing goods at Lynn, entered into an agreement with him for the

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future transaction of the same business, by which the stock, machinery and fixtures then on hand were declared to belong to said Norcross & Craig as tenants in common; all repairs were to be made, fuel, dye-stuffs, rent and help paid for, and the business carried on by Norcross; and Craig was to superintend the establishment, and to receive in full for his services a certain sum per yard for every yard of goods printed. The bill further set forth that the business was carried on under this agreement until the death of Norcross in January 1863; that the title of Norcross to the property has become vested in the plaintiff, as administrator; that after the death of Norcross the defendant continued to carry on said works and use the machinery and consume the fuel and dye-stuffs without the plaintiff's authority; that the plaintiff has since demanded of the defendant some account of the said business, and desired possession of a part of the property, or a division or sale of the same; that the defendant has refused to exhibit any account of the transactions between himself and Norcross, or any account of the manner in which said print-works have been carried on, or to account for the use of the machinery or the consumption of dye-stuffs, or to deliver to the plaintiff any part of said property, or to consent to a sale of the same. The prayer was for an account of the business and property, and the appointment of a receiver, and for other relief. The defendant filed a general demurrer, upon which the case was reserved by *Metcalf*, J. for the determination of the whole court.

H. C. Hutchins, for the defendant.

The plaintiff, *pro se*.

Dewey, J. The matters alleged in this bill and the relief sought do not present the issue upon this demurrer as necessarily dependent upon the question of the right of one tenant in common of an article of personal property to compel a sale of the whole property against the wishes of his cotenant. The bill alleges not only a joint ownership of stock, machinery and fixtures, but a joint business, carried on by the parties. It alleges a refusal on the part of the defendant to render any account of the transactions between them, or of the manner in which the

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work was carried on, as well as a refusal to deliver to the plaintiff any part of the property, or to consent to a sale of the same, and a division of the proceeds according to the respective rights of the parties.

The jurisdiction of a court of equity as to cases of tenancy in common, or joint interest in personal property, seems to be unquestionable. Gen. Sts. *c.* 113, § 2. *Perry* v. *Henry*, 4 Pick. 75. In what mode and to what extent the court will interfere and order a sale of machinery and other personal property owned by tenants in common for the purpose of closing the concern, in case of the death of one of them, it is not necessary in the present stage of this case to decide.

This general demurrer to the whole bill must be overruled.

Boston & Worcester Railroad Corporation *vs.* Franklin Haven & another.

If a mortgage of real estate, executed by a railroad company to trustees to secure the payment of certain bonds therein described, with semi-annual interest, provides that in default of payment the trustees may enter into and take possession of the premises, and "by themselves, their agents or substitutes, have, use and enjoy the same, making from time to time all needful repairs, alterations or additions thereto, and, after deducting the expenses of such use, repairs, alterations and additions, apply the proceeds thereof to the payment of the principal and interest of all said bonds remaining due and unpaid, *pro rata*," and that the trustees "shall be entitled to receive proper compensation for every labor or service performed in the discharge of said trust, in case they shall be compelled to take possession of said premises, or any part thereof, or to manage the same," the trustees, having taken possession for breach of condition, may, on a bill to redeem, be allowed any sum which is reasonable for their own services, and expenditures authorised by the mortgage, but not for counsel fees in suits between them and the mortgagors, or for insurance procured by them without the request of the mortgagors.

Bill in equity to redeem certain land, with buildings and railroad tracks thereon, from a mortgage executed by the Grand Junction Railroad and Depot Company to the defendants and Robert G. Shaw, now deceased, to secure the payment of certain bonds, to the amount of $350,000. The mortgage

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contained the following provision, in addition to those copied in 4 Allen, 81–83: "And it is further mutually agreed . . . . . that said party of the second part, their successors and assigns, shall be entitled to receive proper compensation for every labor or service performed in the discharge of said trust, in case they shall be compelled to take possession of said premises, or any part thereof, or to manage the same."

It appeared by the report of an assessor that the defendants obtained formal possession of the mortgaged premises on the 22d of July 1859, as stated in 4 Allen, 80; but that the actual possession of a portion of the mortgaged premises remained with the plaintiffs, and of another portion with Nathaniel Adams and another, while the residue of the mortgaged premises has been held by the defendants. Suits were brought by the defendants to recover possession of the portions of the mortgaged premises which have been held, as above described, by the plaintiffs and Adams and another, which were still pending when the assessor's report was made. See *post*, 363, 369.

In order to derive an income from the portions of the premises held by the defendants, they were obliged to employ agents and laborers; and, to preserve the property, they were obliged to make considerable expenditures. It was agreed by the parties that the account should be stated as of October 1st 1863.

In the suit by the defendants against the plaintiffs for possession, conditional judgment was rendered for $52,500. The interest accrued upon the bonds, which the mortgage was given to secure, from July 1st 1856 to October 1st 1863, was $152,250. The total amount of the gross earnings of the property, since the trustees took possession, was $106,615.54. The total amount of expenditures, including the charge for the personal services of the trustees, was $76,329.68. For their personal services, they charged $5000; which was found to be but a fair and reasonable compensation. They charged $2865.13, paid for legal services. The assessor found that the services were rendered, that the above amount was actually paid, and that the trustees could not have performed their duty without incurring this expense. They charged $517.25, paid for insurance

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effected by them on portions of the property; and the assessor found that they would have been culpable if they had neglected to make the insurance. They charged $1196.79, expended in the construction of an additional railway, and in the purchase of scales. The assessor found that this amount was actually expended for these purposes, that the income was thereby greatly increased, and that the permanent value of the mortgaged property was enhanced to the full amount of the expenditure. The assessor accordingly allowed all of these charges, and the plaintiffs alleged exceptions.

The questions of law arising upon the assessor's report were reserved by the chief justice for the determination of the whole court.

G. S. Hale, for the plaintiffs, cited, as to the charge for services, *Tucker* v. *Buffum*, 16 Pick. 46; *Eaton* v. *Simonds*, 14 Pick. 105; *Gibson* v. *Crehore*, 5 Pick. 146; *Bonithon* v. *Hockmore*, 1 Vern. 316; *Godfrey* v. *Watson*, 3 Atk. 517; *Davis* v. *Dendy*, 3 Madd. 170; as to counsel fees, *Godfrey* v. *Watson*, 3 Atk. 517; *Harbinson* v. *Harrell*, 19 Alab. 753; as to insurance, *Saunders* v. *Frost*, 5 Pick. 270.

S. Bartlett, for the defendants, cited some of the cases cited for the plaintiffs, and, as to the charge for constructing the railway, *Saunders* v. *Frost*, 5 Pick. 259; *Reed* v. *Reed*, 10 Pick. 398; *Boston Iron Co.* v. *King*, 2 Cush. 405; *Woodward* v. *Phillips*, 14 Gray, 132.

Chapman, J. It is conceded that the plaintiffs have a right to redeem, and the case has been sent to an assessor to state an account of the sums due to the defendants as mortgagees, and also of the rents and profits due from them. Upon the coming in of his report, certain objections are made to some of the items therein stated.

1. The amount allowed for the superintendence and management of the property is objected to, and the cases of *Tucker* v. *Buffum*, 16 Pick. 46, and *Gibson* v. *Crehore*, 5 Pick. 146, are cited in support of the objection. But this case is quite unlike either of them. The property consists of a wharf, railroad and warehouses, and its profitable management requires much labor

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and expense. In making the mortgage, the parties took into consideration the peculiar nature of the property, and provided that if the mortgagees, who are mere trustees, should take possession for condition broken, they might "by themselves, their agents or substitutes, duly constituted, have, use and enjoy the same, making from time to time all needful repairs, alterations or additions thereto, and, after deducting the expenses of such use, repairs, alterations and additions, apply the proceeds thereof to the payment of the principal and interest," &c. It also contains a provision that they "shall be entitled to receive proper compensation for every labor or service performed in the discharge of said trust, in case they shall be compelled to take possession of said premises, or any part thereof, or to manage the same." All the sums which the assessor has allowed for services and expenditures come within these stipulations, and he has found that the charges are reasonable.

2. The charges for money paid to counsel for legal services ought not to be allowed. It is suggested in behalf of the defendants that they were paid for the benefit of the mortgagors as well as of the mortgagees. But it is obvious that the litigation which has been had in this court has been for the exclusive benefit of the bondholders, of the one part, and for the benefit of the mortgagors and their lessees, of the other part. As the trustees have paid these sums for the benefit of the bondholders, the amount should be charged to them and not to the plaintiffs. It is like an ordinary case where a mortgagee brings a suit, and the mortgagor contests the whole or a part of the claim, whereby the mortgagee is put to the expense of employing counsel. Legal costs are all that the mortgagors are liable to pay in their controversy with the mortgagees.

3. The charges for insurance should not be allowed. These were for the benefit of the bondholders, but not for the benefit of the mortgagors or the plaintiffs. Insurance procured by a mortgagee is not chargeable to the mortgagor, unless it is procured at his request or by his agreement. *Saunders* v. *Frost*, 5 Pick. 270.

4. A question is raised as to the decree that should be

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entered. It appears that the principal sum is not yet due; and, according to the terms of the mortgage, upon payment of the arrears of interest, the plaintiffs ought to be restored to the possession of the premises, and to hold the same so long as they continue to perform the condition of the mortgage. The amount to be deducted for rents and profits cannot now be ascertained, because it depends partly upon what shall be received by the defendants upon the judgment to be rendered in two pending suits; one against these plaintiffs, and the other against Adams and others. This case must be continued till that amount shall be ascertained, and in the mean time the assessor's report should be recommitted to him, to make a report that shall include the rents and profits and expenses up to the time when the decree shall be entered, and then stand for further direction.

FRANKLIN HAVEN & another *vs.* NATHANIEL ADAMS & another.

If, during the pendency of an action to foreclose a mortgage of land, the mortgagor leases and delivers possession of a portion of the mortgaged premises to a tenant, who retains the actual possession thereof under a claim of right, by virtue of certain provisions of the mortgage, after formal possession has been delivered to the mortgagee upon the execution recovered in his suit, and it is afterwards adjudged, in a writ of entry brought to try the title, that the mortgagee is entitled to possession as against such tenant, he may recover damages for rents and profits from the time when the formal possession was delivered to him, and is not limited to the time of the commencement of his action.

Such tenant, having taken his title *pendente lite*, cannot be allowed compensation for any buildings or improvements made or erected on the premises by him, although he had reason to believe his title to be good; but damages should be assessed for the rents and profits of such buildings and improvements, as well as of the land.

The Gen. Sts. *c.* 134, §§ 18, 19, allowing compensation to tenants in real actions for buildings or improvements made or erected on the premises, under certain circumstances, are not applicable to the case of buildings or improvements made or erected by a mortgagor or any person claiming under him.

WRIT OF ENTRY. After it had been determined that the demandants were entitled to recover, (4 Allen, 80,) questions arose concerning the value of the rents and profits, and of the

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improvements made by the tenants, which were referred to an assessor, who reported the following facts:

The action to foreclose the mortgage was commenced on the 11th of April 1857. The lease to the tenants was dated May 1, 1858. In 1858, the tenants erected upon the demanded premises a brick warehouse, at a cost of $20,500, in pursuance of the lease, by which they were to hold the land and warehouse, and to receive and retain to their own use the rents and income thereof, until the cost of the erection and interest thereon should be reimbursed to them. Conditional judgment in said action was rendered on the 6th of May 1859, and formal possession of the mortgaged premises was delivered to the trustees on the 22d of July 1859; but the actual possession of the premises demanded in the present action remained with the tenants. The present action was commenced on the 23d of November 1860. The demandants claimed to recover damages for the rents and profits received by the tenants since the 22d of July 1859; but the tenants insisted that they were only liable for such as had been received since the commencement of this action.

The tenants also alleged that they have held the premises under a title which they had reason to believe good, and they claimed compensation for the value of their improvements. It appeared that they were aware of the mortgage when they took their lease; that Mr. Whiting, a counsellor at law, who drew the mortgage, assured them that they would be safe in taking the lease; that the demandants were informed of the terms of it, and signified their approval thereof, which was communicated to the tenants; that the tenants understood that the assent of the trustees was necessary, and in the draft of the lease a clause was inserted, to be signed by the trustees, by which they would signify their assent and approval, and the tenants were assured, by the party with whom they contracted, that the trustees would sign it; but in fact the trustees did not sign it, and the tenants did not confer with the demandants or consult counsel, except as stated.

The assessor found the value of the improvements to be

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$18,400, and he also found the value of the land; and he assessed the rents and profits in the alternative, exclusive of the value of the use of the tenants' improvements, and inclusive of such value, from the periods contended for by both parties.

The questions of law arising on this report were reserved by the chief justice for the determination of the whole court.

S. Bartlett, (*G. G. Hubbard* with him,) for the demandants.

J. G. Abbott & J. W. Rollins, for the tenants.

CHAPMAN, J. The ground on which the demandants are entitled to recover in this action is stated in the report of this case in 4 Allen, 80. They had recovered a conditional judgment in an action against the mortgagors and the second mortgagees of a tract of land of which the premises demanded in this action constitute a part, and had been put in possession under a writ of *habere facias*. The tenants were then in possession under a title which they derived from the mortgagors and those claiming under them, during the pendency of the action for foreclosure, and were not actually expelled, but remained in possession. But they did not remain by consent of the demandants. On the contrary, they set up a title adverse to that of the demandants, and it has been heretofore decided in this action that they were disseisors.

One of the questions which now arise upon the report of the assessor, who was appointed to hear the parties upon the demandants' claim for rents and profits, and the tenants' claim for improvements, is, whether the demandants shall recover rents and profits from the time when the adverse possession of the tenants commenced, or from the date of the writ. The tenants contend that until the date of the writ they remained in possession by license of the demandants, and therefore were not liable to pay rent. They do not allege that there was any express license, but they contend that it is to be legally implied from the facts in the case. But the court are of opinion that this position cannot be maintained. Until the demandants were put in possession under their writ of *habere facias*, the mortgagors and the tenants claiming under them were entitled to the rents and profits. *Wilder* v. *Houghton*, 1 Pick. 87. From that time

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the demandants became entitled to them. If the tenants had remained in possession by their consent, they would have been liable to pay rent as tenants at will. But as they set up an adverse title, and remained in possession asserting it, they assumed the liability of disseisors, and in this action they must be treated as such from the time when their adverse occupation commenced. Their whole defence in this case is utterly inconsistent with the idea of a license from the demandants, for it sets up a title in hostility to that of the demandants.

The tenants further contend that they are entitled under Gen. Sts. *c.* 134, §§ 18, 19, to compensation for the value of the warehouse mentioned in the assessor's report. While the suit for foreclosure was pending they took their title under the mortgagors, made their entry and erected the warehouse; and they have offered evidence, which is reported by the assessor, tending to show that they held the premises under a title which they had reason to believe good as against the demandants. We assume that the evidence is sufficient to prove the fact, and that they actually believed that the mortgagors had reserved in the mortgage a power to themselves to create new estates at their own pleasure, which should supersede the estate of the mortgagees, and destroy the security which was given by it to the bondholders. It would be a strange thing if a pledge should be given as a security for a debt, with a right reserved to the pledger to retake it at pleasure without payment of the debt; or that a grant should be made with a power reserved to the grantor to supersede it at his pleasure by a new grant to a stranger. But if the tenants supposed that such a power had been reserved, and that they had obtained an estate in the premises by virtue of a valid execution of such a power, and erected their warehouse under that belief, still they cannot avail themselves of it in this action, consistently with any legal rules. They did not enter and take possession by a title derived from strangers, and oust the mortgagors, so as to enable the mortgagors to plead the ouster in abatement of the writ brought for the purpose of foreclosure. See *Weston* v. *Spiller*, 2 Allen, 125. But they entered under the mortgagors, and thus, coming in *pendente lite*, were subject to

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such judgment as might be rendered in that suit. *Borrowscale v. Tuttle*, 5 Allen, 377.

If the right of the mortgagees to recover in that action had been defeated by the act of the mortgagors in making this title to the tenants, it would have operated as a good defence to that action. It would have barred the demandants' right to recover as effectually as a release or a payment. But no such defence was interposed; and the conditional judgment in that suit was conclusive as to the rights of the mortgagors, and all who had come in under them while the suit was pending. The tenants were then in as mere holders of the equity of redemption. They deny that they had actual knowledge of the pendency of the suit; but this cannot avail them. Purchasers *pendente lite* cannot alter the rights of a demandant. The means of knowledge were open to them, and prudence would have dictated an examination of the records of the court, as well as of the registry of deeds. *Lis pendens* is notice to all the world. Bouvier's Law Dict., and cases there cited. They must in this action be treated as in possession by an act of disseisin committed subsequent to the execution of the *habere facias*, and no notice can be taken of the erection of buildings prior to that time, any more than of prior rents and profits.

There is still another objection to their claim for improvements. They hold the equity of redemption, and might at any time, within the time limited by law, avail themselves of the value of their warehouse by redeeming the mortgaged premises. A bill in equity brought by the Boston and Worcester Railroad Corporation to redeem the mortgage is in fact pending, and the terms upon which they may redeem are to be settled at the same time with the decision in the present action. In the suit to redeem, the demandants must account for the rents and profits which they recover in this action. These rents and profits avail the demandants merely as an increase of their security. The same is true in respect to the warehouse. There is, therefore, no reason why the tenants should recover compensation for the warehouse. If they were to do so, the demandants would be obliged first to pay its value to the tenants, and

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then to restore it to the holders of the equity of redemption, without any remuneration. The provisions of Gen. Sts. *c.* 134, §§ 18, 19, are not applicable to such a case. They are intended to provide for cases where the demandant acquires by his judgment an absolute and indefeasible title to the land. In such cases it is equitable that he should pay for improvements that have been made by the tenant in good faith and by mistake, because he obtains the benefit of them. The statutes on this subject have much natural equity for their basis. *Whitney* v. *Richardson*, 31 Verm. 300. *Plimpton* v. *Plimpton*, 12 Cush. 458. But where a mortgagor or those claiming under him make improvements, they may avail themselves of their improvements by merely paying the debt for which the land is pledged. If the debt is not paid, and the mortgagee is compelled to bring an action for foreclosure, he does not in such action recover for rents and profits, and there is no reason why he should pay for improvements.

Upon these views of the case, the assessor was right in including the buildings in his estimate of rents and profits. The judgment in the action for foreclosure was, that the demandants should recover the land described, with the appurtenances; thus including the warehouse. Upon taking possession under that judgment, the demandants were entitled to hold the building. The disseisin for which the present suit is brought includes that as well as the land, and the claim for rents and profits extends to all the property of which the tenants disseised the demandants.

The assessor's report states the rents and profits up to October 1st 1863. While the questions here decided have been pending the adverse possession has continued, and thereby a further claim for the subsequent rents has accrued; and it is necessary to recommit the report to the assessor in order that the amount may be settled up to the time of rendering judgment.

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Franklin Haven & another *vs.* Boston and Worcester Railroad Corporation.

If a mortgagor of land leases the same for a term of years, and for a certain rent, to a third person, from whom he receives an advancement of money under an agreement that he will expend it in buildings and improvements upon the land, which is accordingly done, the lessee, after judgment has been rendered against him in a writ of entry brought by the mortgagee, cannot be allowed compensation for the buildings and improvements, although he had reason to believe that, under the terms of the mortgage, the mortgagor had a right to execute such a lease, which would be valid as against the mortgage.

Writ of entry. After it had been determined that the demandants were entitled to recover, (4 Allen, 80,) questions arose concerning the value of the rents and profits, and of certain improvements made upon the premises, which were referred to an assessor, from whose report it appeared that the facts relating to the execution of the mortgage, the commencement of a suit for the foreclosure thereof, the rendition of conditional judgment therein, the delivery of formal possession to the demandants, and the taking and retention of the actual possession by the tenants, were the same as heretofore stated. 4 Allen, 80. *Ante*, 360.

On the 1st of July 1853, the Grand Junction Railroad and Depot Company executed a lease of the premises to the tenants, for a certain rent, for thirty years, and on the same day the parties to the lease entered into an indenture by which it was agreed, amongst other things, that the tenants, in consideration of said lease, should advance to the lessors, as a loan upon their bonds, an amount not exceeding $100,000, the avails of which bonds should be wholly expended in the construction of a certain railroad and of certain improvements and buildings to be made and erected upon the demised premises, and that the lessors should within one year erect and finish convenient warehouses upon the premises, not to exceed in cost $20,000.

There was evidence tending to show that the tenants had reason to believe that, under the terms of the mortgage, the mortgagors had a right to execute such a lease, which would be valid against the mortgagee; and the tenants claimed compensation

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for the warehouses erected under the circumstances above stated. The assessor found the value of them to be $15,000; and he assessed the rents and profits, as in the preceding case. Other facts were also reported, upon which questions arose similar to those in the preceding case.

The questions of law arising on this report were reserved by the chief justice for the determination of the whole court.

S. Bartlett & G. G. Hubbard, for the demandants.

G. S. Hale, for the tenants.

CHAPMAN, J. The tenants claim compensation for certain buildings which they say were erected by them on the premises that have been recovered by the demandants in this action. But the evidence does not prove that the buildings were erected by them. They lent money to the mortgagors, which was to be expended in the erection of the buildings; but it was to be repaid with interest, and they were to occupy the buildings, not as their own, but as the tenants of the mortgagors, for a stipulated rent. The buildings were to be erected by the mortgagors at their own expense, and were to be their property.

The buildings were erected while the mortgagors held the land, as mortgagors in possession; not adversely to the demandants, their mortgagees, but in conformity with the terms of the mortgage. As mortgagors they were not liable to the demandants for rents and profits, nor entitled to compensation for improvements. The present tenants can have no greater claim for improvements than their landlords had. After the rights of the parties were conclusively settled by the conditional judgment, and the demandants had taken possession of the premises under their *habere facias*, the tenants disseised them, and the present action relates merely to that disseisin. The demandants cannot recover for rents and profits prior to it, nor can any prior improvements be considered. Nor is there any equity in the claim of the tenants for compensation for improvements. For the demandants will hold all sums recovered by them for rents and profits in trust to apply to their debt, and the tenants, in their bill in equity to redeem the premises, will have the benefit of it, and, when they redeem, the buildings will be theirs, to hold

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according to the terms of their lease. Some of the points that arise in this case are discussed in the case of these demandants against Adams and another, *ante*, 363. The report must be recommitted, in order that the assessor may ascertain and report the amount of rents and profits to the time of entering up judgment.

Lexington and West Cambridge Railroad Company *vs.* David Elwell & others.

The sureties on the bond of the treasurer of a railroad company, the condition of which provides for his faithful discharge of the duties of the office "during his continuance in office, during the present year and for such further periods as he may from time to time be elected to said office," are not liable for defaults which occur after an omission to reëlect him at a regular meeting for that purpose, and after such further time as may be reasonably sufficient for the election and qualification of his successor, although he continues to act as treasurer, and is reëlected at the next regular meeting thereafter; but they are not discharged from their liability by a vote of the corporation postponing for five weeks the time of the regular meeting for the election of officers, and the consequent postponement of an election for that period, nor by the corporation's assuming the entire management of the railroad, after having leased it to another corporation.

No formal vote of a corporation accepting their treasurer's bond needs to be shown, in order to entitle them to maintain an action upon it.

A corporation is not estopped to maintain an action upon their treasurer's bond by having accepted a report of an auditing committee who had approved his accounts, nor by making a report founded thereon to the legislature.

An indorsement by the treasurer of a corporation upon notes signed by himself, and running to the corporation, is sufficient evidence to render the sureties upon his bond liable for the amount indorsed, as for moneys received by him in his official capacity.

If the treasurer of a corporation has appropriated to his own use sums of money received from a certain source during the time covered by his official bond, and other sums received from the same source after the bond had expired, and he has afterwards entered upon the books a sum as received from that source, and such sum was not in fact received at the date of the entry, and there is nothing to show when the same, or the items of which it was composed, should have been entered, it is proper, in an action upon the bond, to apply one half of it to the time covered by the bond.

Contract upon a bond executed by the defendants as sureties of William Stevens, the plaintiffs' treasurer, dated January 2, 1850, with the following condition:

"Whereas the said William Stevens has been elected to the office of treasurer of the said Lexington and West Cambridge

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Railroad Company, and has signified his acceptance thereof; now if the said William Stevens as treasurer shall during his continuance in office, during the present year, and for such further periods as he may from time to time be elected to said office, well and truly perform the duties of said office, and shall faithfully disburse all moneys that may come into his hands, and shall in all respects faithfully discharge all the duties of said office, according to the laws of said commonwealth and the by-laws of said company, then this obligation shall be null and void; and shall otherwise remain in full force and virtue."

The case was referred by this court to W. G. Russell, as assessor, who found the following facts:

By article 1st of the by-laws, adopted in 1845, it was provided that the annual meetings of the corporation should be held on the last Wednesday of June, in each year. By article 7th it was provided that the treasurer's bond should be in the custody of the president. William Stevens was duly elected treasurer of the corporation in July 1849; and the bond declared on has been, from the time of its execution until the commencement of this action, in the custody of Charles Hudson, who has been annually elected and has acted as president during all that period. No vote is to be found upon the records of the stockholders or directors, accepting or in any way relating to the bond; but it was proved that in 1856 it was submitted to the board of directors at one of their regular meetings.

At a special meeting of the corporation held for the purpose in July 1849, it was voted that the 1st article of the by-laws be so amended, that the annual meeting should thereafter be held on the 1st Wednesday of August instead of the last Wednesday of June, and that the board of directors then existing should hold over during the interval. The annual meetings were accordingly thereafter held on the 1st Wednesday of August, and a board of directors was annually chosen, who annually from 1849 to 1859 elected Stevens as clerk and treasurer. The record of the directors' meetings showed no election of treasurer by the board of directors chosen at the annual meeting for 1860; but

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at the first meeting of the directors Stevens was chosen clerk, and it was voted to postpone the election of treasurer till the next meeting. The records showed nothing further in relation to the election of treasurer until the meeting of the new board of directors, elected in 1861, who at their first meeting, held in August 1861, elected Stevens as clerk and treasurer. He was also reëlected in 1862, and died on the 28th of August 1862. He acted as treasurer during the whole period between the annual meeting in 1860 and his election in 1861. There was also a vote of the directors in December 1860, accepting "the report of the doings of the business of the year, as prepared by the treasurer;" his account for the year ending July 27th 1861 was produced in evidence, signed by him; and it was proved that each year while he acted as treasurer a detailed account, purporting to contain a full and accurate statement of all sums received and paid out by him, was presented by him and accepted by a vote of the stockholders. During each of the years from 1856 to 1861, a committee was chosen to settle with the treasurer, or to audit his accounts, and they reported each year, except in 1860, when certain of the directors examined the accounts, that they found the accounts to be correct.

From 1847 to 1857 the railroad of the plaintiffs was under a lease to the Fitchburg Railroad Company, and during that time it was equipped, managed and operated by them; and after 1857 it was operated by the plaintiffs.

The assessor found that Stevens had converted to his own use, prior to July 1860, funds of the plaintiffs to the amount, including interest to the date of the writ, of $2677.09; and after January 1st 1861 funds to the amount, with interest, of $963.34.

He further found that, at sundry times between August 1st 1858 and January 1st 1860, Stevens received sums to the amount of $400, which should have been entered to the credit of the passenger department and the freight department, but which he did not enter at all; and that, at sundry times after January 1st 1861, he received sums to the amount of $400, which should have been entered to the credit of the same accounts but which

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he did not enter at all; that on the 25th of August 1862 he entered upon the books to the credit of the passenger department, "Cash received of I. N. Damon, August 9, 1862, omitted, $265." It did not appear that this sum had been paid by Damon at or about that time, or that the passenger department should be credited with that sum at or about that time, or that any credit of that specific sum was at any one time, or at any specific times, omitted from the credits of that department. The assessor therefore "allowed the same generally in account to Stevens, in set-off to the amounts omitted by him from the credits due to said department, and not in set-off to any specific sums so omitted."

The plaintiffs held a note of Stevens for $1000, dated June 30th 1856, and at sundry times prior to July 1860 Stevens indorsed thereon payments of interest, as having been received by him as treasurer from himself individually, amounting to $180; for which sums no credit was given to the plaintiffs upon their books, or in the annual accounts of Stevens. The plaintiffs also held a note signed by Stevens and another person, upon which similar indorsements of interest were made, but with no entries thereof elsewhere. And there was no other evidence whether the sums mentioned were actually paid or not.

Upon this report of the assessor, the case was reserved by *Merrick*, J. for the determination of the whole court.

J. G. Abbott, for the plaintiffs.

W. Brigham, for the defendants. 1. The bond was never duly accepted. Gen. Sts. *c.* 63, § 2. *Amherst Bank* v. *Root*, 2 Met. 533. *Dedham Bank* v. *Chickering*, 3 Pick. 340. *The King* v. *Forrest*, 3 T. R. 38. 2. The postponement of the time of holding the annual meeting in 1850 discharged the sureties of Stevens. *Chelmsford Co.* v. *Demarest*, 7 Gray, 1. *Middlesex Manuf. Co.* v. *Lawrence*, 1 Allen, 339. 3. If such postponement did not discharge the sureties, the omission to elect a treasurer in 1860 would have that effect. 4. The plaintiffs are estopped by their settlement of the accounts of Stevens, and their reports to the legislature, to maintain this action. *Osgood* v. *Nichols*, 5

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Gray, 420. *Carpenter* v. *King*, 9 Met. 511. *Dewey* v. *Field*, 4 Met. 381. *Harris* v. *Brooks*, 21 Pick. 195. *Baker* v. *Briggs*, 8 Pick. 122. 5. The credit of $265 should be applied to extinguish the older debt. 6. The items of interest were never in fact paid. The defendants are not liable for false indorsements made by Stevens.

Dewey, J. The question in this case arises upon the bond given by William Stevens, and certain other persons as his sureties, for the faithful performance of his duties as treasurer of the Lexington and West Cambridge Railroad Company; and the particular inquiry is as to the period of time during which the responsibilities of the sureties attached.

Several cases bearing upon the general question of liability upon this bond have heretofore been before this court. No one of them is, however, precisely like the present. The case of *Chelmsford Co.* v. *Demarest*, 7 Gray, 1, has decided that a bond given by a treasurer of a manufacturing company, although in general terms, and with the condition "if during his continuance in office he shall faithfully perform," &c., does not bind the sureties beyond the period of his first election, and such further time as is reasonably sufficient for the election and qualification of his successor, the office being by statute an annual one. It was also held that his reëlection from time to time does not charge the sureties, and also that the statute provision, that the treasurers when elected "shall hold their offices until others are chosen and qualified in their stead," does not extend their liability to subsequent elections of the same person.

The case of *Middlesex Manuf. Co.* v. *Lawrence*, 1 Allen, 339, was also a suit upon a bond given by a treasurer of a manufacturing corporation, but the bond in that case contained a provision binding the sureties for his fidelity "for and during such further time as he may continue therein by any reëlection or otherwise." It was conceded that the sureties might be thus bound, if it was distinctly recited in the bond that they should be; but even this provision could not extend their liability beyond the period of the treasurer's continuous holding of his office, and did not include time during which he held the office

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by virtue of a new election after he had left the same, and another person had been the treasurer for a few months.

The office of treasurer in the present case, unlike those just cited, is not by statute limited to one year, and we are therefore to look to some other source for its limitation. That is supposed to be found in the recital in the bond. It was to secure the faithful discharge of the duties of the office during his continuance in office, "during the present year, and for such further periods as he may from time to time be elected to said office." This recital that the office was one for the present year, if nothing further had been added, would clearly have limited the liability to that year, as it seems well settled that the limitation may be shown, either by a statute limiting the office, or by a recital of the term of office in the bond. That the bond may be limited by a recital of the term of office in the bond itself was early settled in the cases of *Arlington* v. *Merricke*, 2 Saund. 411, and *Liverpool Water Works* v. *Atkinson*, 6 East, 507. It was affirmed and somewhat extended by the opinion of this court in *Dedham Bank* v. *Chickering*, 3 Pick. 341. It was conceded by the court in the case of *Amherst Bank* v. *Root*, 2 Met. 522, that a recital in a bond that one has been appointed to an office for a limited time would restrict the liability of his sureties.

But the additional provision in this bond as to the further periods during which the treasurer may hold his office by reëlection from time to time creates the doubt in the present case. This provision we suppose to be legal and binding on the sureties, if expressed in apt and proper words. In the present case, had the plaintiffs duly discharged the duty of making regular annual elections of their treasurer, we perceive no ground for exempting the sureties from liability upon their bond for defaults in the office while he thus held it under successive annual elections. For nine successive years after the date of this bond such elections were regularly made, and the party thus elected continuously held the office and performed the duties of the same, and for that period this bond would clearly attach.

We see no ground of objection to this view of the case arising from the fact that the time of holding the annual meeting was

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changed in 1849 from the last Wednesday of June to the first Wednesday of August. This postponement of the time of the annual meeting was by the enactment of a by-law to that effect. The office of treasurer was to be holden for the official year, as established by the corporation. This point seems to have been fully met in the opinion of the court in *Chelmsford Co.* v. *Demarest*, 7 Gray, 1. The election having been made on the first Wednesday of August 1849, that was the annual election contemplated by the parties, and was all that was required to keep the bond in force.

The case in relation to the year 1860 presents more serious difficulties. The company wholly neglected to elect a treasurer for the year succeeding their annual meeting in 1860. They voted at that time "to postpone the election of treasurer to the next meeting;" and in fact no election was made until the 12th of August 1861.

Assuming that this office is, by the recital in this bond, to be treated as an annual one, the liability of the sureties would be limited, as we have seen, by the case of *Chelmsford Co.* v. *Demarest*, to the year for which the party was elected, and for such further time as was reasonably sufficient for the election and qualification of his successor, and no longer, although the corporation failed to elect at their next annual meeting. This would be decisive against the right of the plaintiffs to recover for subsequent defaults, had there been only the general stipulation that the party should, during his continuance in office, faithfully perform the duties of the same. What then is the effect of the further provision in the bond, "and for such further period as he may from time to time be elected to said office"? Does this render the sureties liable during the period of a year in which there was no election, and does it embrace the case of an election or elections made after the expiration of a year in which there is no election?

If the plaintiffs would treat this as a continuing guaranty, applicable to future appointments, must not those appointments be continuous and regularly made? We have already seen that in the case of a surety to one holding an annual office, the

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fact of his principal continuing to perform the duties of the office for a subsequent year has no effect, even if the bond was "if during his continuance in office he shall faithfully perform," &c. The bond only extended to a reasonable time beyond the year, sufficient to elect and qualify a new treasurer. So here, where this bond provided for the liability of the surety, not only for "the present year," but also "for such further periods as he may from time to time be elected to said office," was it not implied that those elections were to be continuous and at the expiration of each year?

Had there been no election in 1861 and 1862, we suppose it would be quite clear that the election to the office of treasurer in 1859 for one year would not have charged the sureties for defaults of the principal occurring in those latter years. The election of 1859 charged the sureties for the faithful services of the principal to the time of the annual meeting in 1860, and for such further reasonable time as was necessary to elect and qualify a successor. That period was exhausted long before the election in 1861. To charge the defendants for defaults in 1861 and 1862, it must be held that upon any future election, however remote from the previous one, this bond would attach if no third person had been placed in the office in the meantime. The practical effect of such a decision would be, that the sureties would become responsible by the terms of their bond for any defaults at any future time, although the corporation wholly neglected its duty to make an election at the expiration of the appointed term of office. This is not, we think, the proper construction of this bond. The sureties had a right to all the benefits that might arise from a non-election. In making such election, the directors may be said to affirm their confidence in the incumbent. Permitting him to discharge the duties of an incumbent in office was a different thing. The effect of the omission to elect on the first Wednesday of August 1860, and until August 1861, was to limit the liability of the sureties to the time preceding the annual meeting in August 1860, with such further reasonable time as was necessary for electing and qualifying a successor. This limitation having once attached,

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the liability was not one to be revived by an election in August 1861. The bond contemplated continuous elections, and a continuous liability. The case of *Middlesex Manuf. Co.* v. *Lawrence*, 1 Allen, 339, presented this ground of defence under facts somewhat stronger for the sureties, as there had been an actual withdrawal from the office, and the appointment of another for a few months, after which the former treasurer was reappointed and assumed the office again. The general language of the bond in that case was equally comprehensive with that used in this bond. The facts were different in the point specified. The continuing in office "by any reëlection or otherwise," was in that case, notwithstanding the subsequent election, held to be effectually interrupted by the appointment of a new incumbent and the withdrawal of the old one for a few months.

The continuance in office was here interrupted, as to the sureties, by the omission of the directors, after the expiration of the period for which he was elected, for twelve months to make an election. The obligation of the sureties, as to such further periods as he may from time to time be elected to said office, implies continuous reëlections. The result is, therefore, that the sureties upon this bond are only liable for the defaults of the principal while he held office under the election of 1859, and the previous years, being those defaults reported by the assessor as having occurred prior to the 1st of July 1860.

An objection was taken to the right of the plaintiffs to maintain any action upon this bond, upon the ground that the same had not been approved and accepted by the directors. Under the decisions of this court, and the cases cited in *Amherst Bank* v. *Root*, 2 Met. 533, the evidence upon that point was sufficient. The Gen. Sts. *c.* 63, § 2, do not seem in form to require a specific act of approval of the bond of the treasurer by the directors.

Nor is there any ground for avoiding liability upon the bond, by reason of the change in the mode of conducting the business of the road after the termination of the lease of the road, which occurred in 1857.

Nor do the various reports of the committees of the corporation appointed to audit the accounts of the treasurer estop the

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plaintiffs from enforcing a claim for unfaithfulness and misappropriation of the funds intrusted to him, against the sureties in the bond.

The sureties are properly chargeable with the sums indorsed as interest paid upon the notes of said Stevens to the plaintiffs. The indorsements thus made furnish sufficient evidence to create such liability, without any further evidence of actual payments of money.

The only remaining subject of inquiry is that of the application of a sum of $265, entered upon the books of the corporation by Stevens as a credit to the passenger department, in these words: "Cash received of I. N. Damon, Aug. 9, 1862, omitted, $265." The assessor, in the absence of any satisfactory evidence as to the time or circumstances of this entry or the payment of this sum, has allowed the same generally in reduction of sums charged to Stevens for moneys received of Damon, and not wholly in reduction of the specific sum of $400 charged as a default before July 1st 1860. For the reasons assigned by the assessor, we are of opinion that the defendants cannot properly object to the disposition of this item thus made.

THOMAS B. WALES & others *vs.* THE CHINA MUTUAL INSURANCE COMPANY.

A time policy of insurance on a vessel contained an extension clause, as follows: "If on a passage at the end of the term, the risk to continue at *pro rata* premium until arrival at port of destination." At the end of the term the vessel was on a passage to Woosung, under a charter party which provided that, "on arrival at Woosung, the captain shall take his orders from the chief of the French marine service at that port, who will indicate to him within twenty-four hours if he is to discharge at Woosung, or go on to Chusan, and that after the arrival of the ship at Woosung the marine might keep her as long as it might wish, and send her to such safe and accessible port as it might judge desirable." *Held*, that if no orders to go to another port were received within twenty-four hours after notice to the chief of the French marine service at Woosung of her arrival there, that should be regarded as her port of destination, within the meaning of the extension clause.

CONTRACT on a policy of insurance, by which the defendants insured the plaintiffs in the sum of $15,000 on the ship

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Hesperus, for one year from the 23d of November 1859, containing these stipulations: "If on a passage at the end of the term, the risk to continue at *pro rata* premium until arrival at port of destination." "To continue during the voyage aforesaid, on the vessel until she shall be arrived and moored at anchor twenty-four hours in safety, and on the property until landed."

At the trial in this court, before *Merrick*, J., it appeared from the deposition of the captain that at the end of the year the vessel, laden with coal, was on a passage from Liverpool under a charter party to the French marine, which provided that she should carry her cargo to China; that she should "proceed direct, and without calling at any port, to Woosung, near Shanghai, there to take orders. On arrival at Woosung, the captain shall take his orders from the chief of the French marine service at that port, who will indicate to him within twenty-four hours if he is to discharge at Woosung, or go on to Chusan. If the delivery of the cargo is not to be made at Woosung, the captain shall sail for the destination which shall have been indicated to him within the twenty-four hours following the notice which shall be given to him, unless hindered by force major." "Any delay arising out of the act of one or other of the contracting parties in the execution of the" above conditions "shall give rise, to the profit of the injured party, to the payment by the other party of an indemnity of fifty centimes per register ton for each day's delay." "The marine shall, besides, have the power, after the arrival of the ship at Woosung, (or at Chusan, if sent to that island,) to keep her as long as the marine may wish, and send her to such safe and accessible port as it may judge desirable." The vessel arrived, on the 25th of December 1860, at a place near the mouth of the Shanghai River, which the plaintiffs for the purposes of the trial admitted to be within the port of Woosung, and on the next day the captain gave notice thereof to the French authorities, and received orders not to discharge at Woosung, but to remain at anchor there until he should receive orders in writing. On the 6th of January following, the ship was totally destroyed by fire.

The judge ruled that, under the policy and charter party, the

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liability of the defendants did not necessarily terminate with the arrival of the ship at Woosung; that Woosung was not necessarily her port of destination, but that her port of destination would be the place at which she should be finally ordered by the French marine to discharge her cargo; and if the loss occurred before such orders had been received, and without an unreasonable delay, awaiting such orders, it would be within the policy.

The case was thereupon reserved for the determination of the whole court, with the agreement that if the above ruling was right the defendants should be defaulted, and the case sent to an assessor to determine the amount of damages; otherwise the case should stand for trial.

B. R. Curtis & H. Gray, Jr., for the plaintiffs. The port *into* which a vessel may come is described in three ways; as a port of arrival, a port of destination, and a port of discharge. A port of arrival is a port to which a ship voluntarily goes for any purpose. A port of destination is a place to which a ship is destined to go to accomplish a purpose of an existing voyage; as, if in ballast, to take in cargo; if carrying cargo on freight, to discharge cargo and earn freight. It is not the ultimate termination of a series of voyages. Nor is it a place to which a ship is proceeding to obtain advices, or revenue permits, or a bill of health, or other like means of accomplishing a beneficial purpose of an existing voyage. But it is a place where a purpose of an existing voyage is intended to be accomplished. *Coolidge* v. *Gray*, 8 Mass. 531. *Lapham* v. *Atlas Ins. Co.* 24 Pick. 1. Marsh. Ins. (4th ed.) 203, and cases cited. A port of discharge is the place of the actual and voluntary discharge of the cargo, or a substantial part thereof. The general destination of the Hesperus was China, and the particular port at which the object of her voyage was to be accomplished could not be ascertained till she received orders from the French marine there. Under these circumstances, she was protected by the policy until her arrival at such port. 1 Arnould on Ins. 455-458. *The Heureux Joseph*, Emerigon des Assur. c. 13, sect. 18, § 3. This case is within the principles of insurance to a port

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named and a market, in which the vessel is protected while going to any number of ports for a market, and is not bound to go at all to the port named. *Houston* v. *New England Ins. Co.* 5 Pick. 89. *Deblois* v. *Ocean Ins. Co.* 16 Pick. 308. *Gaither* v. *Myrick*, 9 Maryland, 138. No part of the freight was due at Woosung. The seamen could not have demanded their wages or left the ship there. A general average loss would not have been adjusted there. An insurance on cargo or freight would not have terminated there. If this policy had covered ship, cargo and freight, Woosung would not have been the port of destination of the cargo. Can it then be considered as the port of destination of the ship, when the sole object of the voyage was to carry and deliver the cargo?

B. F. Thomas & J. D. Bryant, for the defendants, cited *Gookin* v. *New England Ins. Co.* 12 Gray, ; *Cole* v. *Union Ins. Co.* Ib. ; *Amer. Ins. Co.* v. *Hutton*, 24 Wend. 330; S. C. 7 Hill, (N. Y.) 321; *Lapham* v. *Atlas Ins. Co.* 24 Pick. 1; *Donnell* v. *Columbian Ins. Co.* 2 Sumner, 366; *Palmer* v. *Warren Ins. Co.* 1 Story R. 364; *Blackett* v. *Royal Exchange Assur. Co.* 2 Cr. & Jerv. 251; *Eyre* v. *Marine Ins. Co.* 6 Whart. R. 247; 3 Kent Com. (6th ed.) 309; 1 Arnould on Ins. 456, 457.

Bigelow, C. J. The rule of construction applicable to the clause usually inserted in time policies on vessels, by which it is stipulated that if the vessel insured is "at sea," or "on a passage" or "a voyage," (which are equivalent expressions,) at the expiration of the term, the risk is to continue until her arrival at a port of destination, is now settled in this commonwealth by the recent cases of *Gookin* v. *New England Ins. Co.* 12 Gray, , and *Cole* v. *Union Ins. Co.* Ib. . It was held in those cases that, by this extension of the risk beyond the term, it was not the intention to enlarge it so as to embrace the entire voyage or succession of voyages on which a vessel might be bound at the expiration of the time named in the policy, and until her arrival at her port of final destination; but that it was designed to have a much more restricted meaning, and to include only such period of time as might elapse between the expiration of the original term insured, if the vessel was then at sea, and her

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arrival at the next port to which she was destined for the purposes of the voyage on which she was bound. If, for example, a vessel insured for a year was at the expiration of that time at sea, bound on a voyage to an intermediate port, there to take in or discharge cargo, or for other like purpose, and thence to another port, the risk under the extension clause, so called, would not continue until her arrival at the latter port, but would terminate at the first port to which she was bound for the purpose of accomplishing one of the objects of the entire voyage on which she was then destined.

This interpretation of the policy is founded on the presumed intent of the parties, as derived from the words of the clause taken in connection with the other parts of the contract. The main object of a policy of this nature is to insure the vessel for the term of time specified. This in legal phrase is the voyage insured. The clause extending the risk beyond this period is only incidental to this main purpose. It is not designed to change the character of the risk, if the vessel happens to be at sea at the expiration of the term insured, so as to convert a policy on time into a policy for a round voyage or a succession of voyages on which the vessel may then be bound. Such, however, would be the character which it would assume on the occurrence of the specified contingency, if it was construed to embrace the voyage to the final port of destination, or that to which she might be ultimately bound at the end of the prosecution of the entire voyage. But such very clearly was not the intent with which the extension clause was added to policies on time. It was designed for a different purpose. If a vessel happened to be at sea when the designated term for which she was insured expired, especially if she had been long absent from port, the owner would be without such information concerning her condition and situation as would enable him to procure new insurance upon her, to take effect at the expiration of the previous term. It was therefore necessary to provide for the continuance of the risk until her arrival in port, so that opportunity might be afforded to the owner to ascertain the state of the vessel by a communication from the master or otherwise, and thus be enabled to obtain a

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new policy to take effect at and from her arrival at the port where she then was. It is obvious that this object could be attained as well at any intermediate port at which the vessel might arrive in the course of her voyage as at her final port of destination, and that to extend the risk beyond such arrival would be contrary to the manifest intent of the parties. It has therefore been settled that, in order to ascertain whether a liability for the loss of a vessel happening in the course of a voyage has arisen under the extension clause in a time policy, it is only necessary to determine whether the loss occurred before or after the arrival of the vessel in a port which may properly be deemed a port of destination, although an intermediate one, short of that to which she was ultimately bound in the prosecution of the voyage in which she was then engaged.

What constitutes such port must necessarily depend very much on the circumstances existing in each case. It has been defined to be a port to which the vessel "has resorted for the purposes of the voyage;" *Gookin* v. *New England Ins. Co. ubi supra;* also as any port, "whether at home or abroad, for lading or discharge, or any other object or business voluntarily pursued." *American Ins. Co.* v. *Hutton*, 24 Wend. 330, 336. Definitions so general and vague leave room for nice and difficult questions. Suppose a vessel, for instance, is bound on a voyage to China, with directions to touch at Calcutta, Singapore or other intermediate port, for the sole purpose of receiving orders as to the particular port in China to which she shall go. Would such an intermediate port be that of her destination, within the meaning of the extension clause? But no such question arises in the present case, in the aspect in which it is presented to us under the ruling of the court at the trial. The case seems to have been reserved without any reference to that clause in the charter party under which the vessel was employed at the time of the loss, which provides that on the arrival of the ship at Woosung, "the captain shall take his orders from the chief of the French marine service at that port, who will indicate to him within twenty-four hours if he is to discharge at Woosung, or

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go on to Chusan." Indeed it does not appear by the evidence, so far as it is reported, that any such orders were given.

But apart from this, the view on which the case was disposed of at the trial seems to have gone to the extent of holding that neither Woosung nor any other port would be her port of destination, within the meaning of the policy, unless it was the port at which she should be finally ordered by the French marine to discharge her cargo. This, we think, was clearly erroneous. Looking at the charter party as we must, not for the purpose of construing the policy, but to ascertain whether this was an intermediate port of destination, we cannot doubt that after the expiration of twenty-four hours following the arrival of the ship at Woosung, during which no orders were given to the master by the French officer in command as to the place of discharge of the vessel, Woosung was the port of destination, according to a just interpretation of the extension clause. It was then wholly uncertain, under the stipulations of the charter party, how long the vessel would remain at Woosung, or whether she would be sent on to Chusan or some other port in China, after the lapse of an indefinite period, or whether she might not be ordered to discharge her cargo at Woosung, and there finally terminate her voyage; so that, in one of the contingencies contemplated by the charter party, the occurrence of which depended, not on the will of the master or owners, but on the orders which might be given by the charterer, Woosung might become a port of discharge as well as of destination. It seems to us that it would be a palpable violation of the rule of interpretation applicable to the extension clause in the policy, and contrary to the reasons on which the rule is founded, to hold that, after the expiration of twenty-four hours subsequent to the arrival of the vessel at Woosung, she was not then at her port of destination. It was then clearly a port which she had visited voluntarily in the accomplishment of one of the purposes of the voyage. If the risk did not then terminate, it was extended indefinitely. We can see no good reason, if the policy remained in force at all after the failure to give orders for the further prosecution of the voyage within twenty-four hours subsequent to the

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arrival at Woosung, why it must not also be held to cover the risk during the days, weeks or months during which she might be thus detained, and also thence on a voyage to China or other port in China to which she might eventually be ordered. Such an extension of the risk would hardly be contended for by the learned counsel for the plaintiffs. Yet we do not see why it is not a legitimate conclusion which must follow, if it be held that Woosung was not the port of destination of the vessel, within the meaning of the extension clause, under the facts assumed in the ruling of the court. But in the view which we take of the case, no such unreasonable result follows. After the expiration of twenty-four hours subsequent to the arrival of the vessel at Woosung, she was at a port where the consignee of the cargo was. She was to remain there indefinitely under his direction, and for an ultimate purpose not determined on, and which might not be arrived at for a long period of time. Under such circumstances, Woosung must be deemed to be the port of destination, within the meaning of the contract declared on.

New trial granted.

ARCHIBALD G. ROGERS *vs.* CATHERINE M. WARD.

A bill in equity lies to enforce payment out of the separate estate of a married woman, so far as she has the right of disposal thereof, of a bond given by her for the price of land conveyed to her to her sole and separate use, provided that no effectual remedy exists at law. And the creditor is not confined to collateral security held by him for the bond.

Such bill need not set out any specific estate or property belonging to the defendant in her own right, but may allege generally that she is possessed of property to her sole and separate use, and subject to her disposal, which is chargeable with the payment of the bond.

The fact that the bond was given before the enactment of the statute conferring full equity jurisdiction upon this court is immaterial.

BILL IN EQUITY alleging that the defendant, the wife of Joseph W. Ward, in November 1855, purchased an estate of Isaac Henderson, in Jamaica, New York, for a price not less than $18,000, assuming and agreeing to pay, as a part of the consideration thereof, a mortgage thereon for $6000 which had been

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given by Henderson, and, as a further portion of the consideration, executing jointly with her husband a bond for $6000 to Henderson, and a mortgage on the estate to secure the same; that said bond and mortgage have since been assigned by Henderson to the plaintiff, and the whole of the principal thereof and a part of the interest thereon are now due; that the first mortgage upon the estate has been foreclosed, and the estate sold at sheriff's sale, pursuant to the laws of New York, to pay the mortgage, and that it brought less than enough to pay the same; that the estate was conveyed to the defendant as her sole and separate property, and that she has sold the same for a large sum since the date of said bond and mortgage given to Henderson; that she has other sole and separate property, either in her own name or in the name or hands of a trustee, which ought to be and is holden for and chargeable with the payment of the bond and interest thereon; but that she has refused to pay the same. The prayer was for a discovery, and a decree for the payment of the bond out of the defendant's separate estate. The defendant filed a general demurrer, and the case was reserved by *Hoar*, J. for the determination of the whole court.

H. C. Hutchins, for the defendant.

H. W. Paine, for the plaintiff.

Bigelow, C. J. The main question which the defendant seeks to raise by the demurrer to this bill has been fully considered and determined in the recent case of *Willard* v. *Eastham*, 15 Gray, . It was there held, on a careful and considerate view of the authorities and of the principles involved in them, that where, by a contract entered into by a married woman, the debt created by it is made expressly a charge on her separate estate, or is expressly contracted on its credit, or where the consideration goes to the benefit of such estate or to enhance its value, equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go. On the facts set out in the bill, it is clear that the debt which the plaintiff seeks to recover in this suit was contracted on a consideration which went to the benefit

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of the separate estate of the defendant. The bond described in the bill, and which the plaintiff now holds, was given by the defendant for a portion of the purchase money of an estate which was conveyed to her, to her sole and separate use. The case, therefore, comes within the rule laid down in the case cited. The estate of the defendant, though she was under coverture when the debt was contracted, is liable therefor, not because the contract has any validity at law, nor by way of appointment or charge, but on the ground that it is just and equitable that the debt should be paid out of the estate which received the benefit of the consideration on which it was contracted.

Nor can we see that the fact stated in the bill, that a mortgage was given by the defendant to secure the payment of the bond now held by the plaintiff, in any degree affects or impairs the equity of the plaintiff to enforce its payment against the separate estate of the defendant. The taking of collateral security for the payment of a debt does not afford any implication that the creditor is to look to it only or primarily for the payment of the debt. The obligation of the debtor to respond in his person and property is the same as if no security had been given. This is the settled rule at law. *Cornwall* v. *Gould*, 4 Pick. 448. *Beckwith* v. *Sibley*, 11 Pick. 484. *Taylor* v. *Cheever*, 6 Gray, 146. It seems to us that equity should follow the law, and apply the same rule to debts contracted by married women. The equitable relief which is afforded to enforce payment of such debts out of their separate property is founded on the reason that the contract is entered into in such form as to indicate an intent to create a personal liability by the wife. Equity will give effect to this intention by assisting the creditor to reach and apply her separate estate, so far as the *jus disponendi* is vested in her. This intent and the facts on which it rests are in no degree affected by the giving of collateral security. The contract, being entered into by the married woman in such manner as would create a personal obligation on her if sole, is decisive evidence that she did not intend that the creditor should look exclusively to the property which was pledged for its payment, but that he should have such other remedies for the

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enforcement of his claim as her personal promise to pay the debt might give him.

Another ground urged by the counsel for the defendant in support of the demurrer is, that the bill does not set out any specific estate or property belonging to the defendant in her own right. But such a statement is not necessary. It is sufficient that it is distinctly alleged that she is possessed of property to her sole and separate use and subject to her disposal, which is holden for and chargeable with the payment of the debt due to the plaintiff. If on the coming in of the answer the defendant does not disclose the existence of such property, but denies the allegation, it will be incumbent on the plaintiff to support it by proof, or, failing to do so, to forfeit his claim to equitable relief. In like manner, if it shall be made to appear that the separate property of the wife is held by a trustee, it will be necessary for the plaintiff, in order to entitle himself to a decree, to amend his bill by making such trustee a party. But until it appears that the property of the defendant is in the hands of a trustee, so that it cannot be properly reached and applied to the payment of the plaintiff's debt without making the trustee a party, the bill is not defective or open to demurrer.

It is also suggested that, when the bond was given by the defendant, it could not have been enforced in this commonwealth against her separate estate, because no court had then the power to take cognizance in equity over the subject matter of the bill, and that this court cannot now afford the relief which the plaintiff seeks by enforcing a contract entered into prior to the time when full chancery jurisdiction was conferred upon it. But this argument confounds the distinction between a right and a remedy. The contract and the obligation imposed by it on the defendant to apply her separate property in payment of the debt did not acquire any force or validity from the statute which gave full equity power to this court. These existed prior to and independently of the statute, which only supplied the means by which they could be enforced.

Finally it is urged that the bond set out in the bill, being a debt contracted by the defendant in relation to her separate

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property, is under the statutes of this commonwealth a debt which can be enforced at law against the separate property of the wife, and that the plaintiff, having thus an adequate and complete remedy at law, cannot ask for the interference of this court to grant him equitable relief. But the answer to this objection is, that it does not appear that the debt which the plaintiff seeks to enforce in this suit was contracted in this commonwealth, or is of such a nature that a married woman would be liable thereon and her property be subject to attachment under our statutes. *Demurrer overruled.*

CHARLES TYNG & another *vs.* JAMES H. THAYER.

If, upon the dissolution of a partnership, it is agreed that the partners who remain shall take the property and close up the business of the firm, and a final settlement between the outgoing and remaining partners is postponed until the adjustment of the outstanding accounts, and the remaining partners subsequently receive upon a particular adventure of the firm an advance which proves to be more than is realized from the adventure, and do not repay the excess, such advance is to be treated, in a suit in equity against the outgoing partner for a settlement, as having been made for the benefit of all the partners.

In closing up the business of the firm, under such an agreement, the remaining partners have a right to use their best judgment in incurring such expenses as seem to be reasonable and necessary, and they are entitled to be allowed therefor; nor can it be objected for the first time, at the argument in this court on exceptions to the report of the master to whom the cause has been referred, that the sum allowed by him was greater than the amount claimed in the pleadings.

There is no error in the admission in evidence, at the hearing before a master to whom a cause has been referred by this court, of a deposition taken out of the Commonwealth on commission, although it does not appear that all the formalities required in depositions taken within the state were observed.

In a suit in equity between partners for a settlement, no final decree can be made while debts due from the firm remain unadjusted, unless the plaintiffs will deduct the amount of such debts from the sum which they seek to recover.

CONTRACT, containing a declaration seeking relief in equity, for a settlement of partnership accounts between the plaintiffs and defendant. The case was referred to a special master, who found the following facts:

On the 1st of August 1856, the plaintiffs, Charles Tyng and Philip Nunez, and the defendant formed a partnership to carry

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on business as merchants at Havana, for two years, under the firm of Charles Tyng & Co. On the 1st of March 1858 the defendant desired to leave Havana, to reside in the United States, and the parties entered into "a memorandum of approximate settlement," which provided, amongst other things, as follows: "The interest of J. H. Thayer in the following accounts ceases entirely from this date, and at the following valuations, viz: [Then followed a list of certain accounts, amounting to $8849, of which the defendant's share, thirty per cent., was $2654.70.] The remaining accounts are to be kept open, and subject to future settlement; but, for the purpose of making at this time an approximate settlement, it is understood that his interest shall be calculated as follows: Of the accounts marked 'good' in the within paper, his interest in the amount, $30,121.04, at thirty per cent., is $9036.45. Of the remaining accounts, marked 'pending,' 'still,' and 'bad,' for an approximate settlement, their values shall be rated as follows: [then followed a list of certain accounts, amounting to $28,817.18, of which the defendant's share was $8645.15, making his estimated interest in all the accounts to be $20,336.30.] Pagarees to the amount of twenty thousand dollars . . . . . are to be given by the new house of Charles Tyng & Co. to the order of J. H. Thayer, as an approximate settlement. It is expressly understood and agreed upon that this is not to be considered as a final settlement; but that, as the various accounts now open shall be closed, his proportion of thirty per cent. of the commissions, profits or losses on these accounts shall be credited or debited to his account, as the case may be, and shall be subject to a final settlement hereafter."

Shortly afterwards, it being considered that the foregoing estimate was too large, it was agreed to reduce the amount of $20,000 to $17,500. The defendant then left Havana for the United States, where he has since lived; and the plaintiffs have continued to carry on business, as the new firm of Charles Tyng & Co. The plaintiffs paid the pagarees, or promissory notes, to the amount of $15,000, at their maturity; and refused to pay the remaining one of $2500, alleging that the business had so

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resulted as to leave a balance due to them; and this suit was brought to recover such balance.

The plaintiffs took certain depositions at Havana, on commission; and the caption and certificates, though stating that the witnesses were sworn, failed to show that all the prescribed formalities were observed. These depositions were offered in evidence before the master on the 24th of June 1862, and the defendant consented that they should be read, subject to all objections. The hearing was adjourned from time to time, and the evidence was not all in until the 6th of January 1863. The defendant in his argument, for the first time, objected specially to the depositions, on the ground that it did not appear from the caption and certificates that the witnesses were properly sworn and examined. The master admitted the depositions.

The master allowed, on the credit side of an account called "Adventure Gonzalez," the sum of $14,000, which the plaintiffs contended should be only $8748.69. The evidence of Charles Tyng respecting this was substantially as follows: "The account called 'Adventure Gonzalez' was an account of a purchase of a cargo of wood, (mahogany, sabicu and cedar,) wrecked near Maniman, on the coast of Cuba. The wood was brought to Havana, and there most of it was shipped, by the ship Fraternidad, to England. At or about the time of the shipment, the house of Morrison & Co., of Havana, with whom we had had other transactions, and who were connected with the International Bank, advanced to us $14,000 on the bills of lading, and the lumber was consigned to a party in England having connection with them. The plaintiffs, before the ship sailed, notified the defendant of the advance. The net proceeds of the lumber, credited by Morrison & Co. to Charles Tyng & Co., April 15, 1859, were only $8748.69. But the balance of the $14,000, advanced on the cargo, has never been repaid to Morrison & Co. Both Morrison & Co. and the International Bank have failed; and Charles Tyng & Co. have been embarrassed, and have not paid their debts at maturity; and the whole matter is still open."

The plaintiffs contended that the money was advanced for

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the new firm, and that they alone were liable to pay it; and that the defendant was only entitled to a credit for his share of the net proceeds of the adventure, in which alone he was interested. But the master considered the defendant entitled to the benefit of this advance, and allowed it accordingly.

The master allowed to the plaintiffs certain items, amounting to $10,195.44, for freight paid to one Gabancho for bringing the wood of the Gonzalez adventure from Maniman to Havana, and for costs and expenses of a suit brought against the firm to recover a part of the freight, and $1000 damages, which the firm were compelled to pay for breach of contract. The old firm of Charles Tyng & Co. had made a contract in writing with Gabancho to bring the wood for a stipulated price; but, after the defendant left Havana, the contract was modified by the plaintiffs. Under the contract as modified, a much higher price was to be paid for the carriage of the lumber. Of this new contract the plaintiffs gave the defendant no notice. After the lumber had been brought to Havana, the plaintiffs refused to pay the whole amount Gabancho demanded for transportation of the lumber, because they claimed that his measurements were not correct. The question in dispute was left to two referees, who disagreed; and a suit was brought by Gabancho, under the Spanish law, to procure the appointment of a third referee, and to enforce the award which should be made. The referees awarded nearly the whole amount claimed by Gabancho; and Tyng & Co. were also obliged to pay one thousand dollars, the amount fixed by the terms of the agreement to be paid by the party who should violate it, and the costs and expenses of the litigation. The defendant contended that the plaintiffs in this suit were in fault for not performing the agreement, and that they must themselves pay all expenses resulting from it; and that, therefore, the items for the stipulated damages, and also for the costs and expenses of the suit, amounting to $1697.44, should not be allowed. The defendant also contended that a valid contract for the transportation of the lumber had been made with a responsible party, and therefore the plaintiffs in this suit had no authority, without the consent of the defendant, to

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make a new contract to pay a higher price; and that, as it appeared that the price was increased an average of fifty per cent. under the new contract, a deduction of one third, or $2758.93, should be made from the amount paid for the transportation of the lumber.

The master found that the payments were made according to the terms of the new agreement. There was evidence showing that the brig owned by Gabancho was the only one to be had, suitable for the transportation of the lumber; that the prices paid under the new contract were necessary and proper, and reasonable in amount; and there was no evidence of any want of good faith or ordinary diligence in making the new contract, or in disputing Gabancho's claim, or in defending the suit. The master therefore allowed all the amounts which the plaintiffs were compelled to pay by the award of the referees.

In the account annexed to the declaration, the plaintiffs claimed an allowance of $1500 for "costs and expenses defending lawsuits entered against us."

The master found that nothing was due from the plaintiffs to the defendant on the remaining note for $2500, given by them to him; and that there was due from the defendant to the plaintiffs the sum of $3171.96, with interest from the date of the writ. Both parties alleged exceptions, which are stated in the opinion. These exceptions were overruled; and the parties appealed to the whole court.

J. J. Storrow, for the plaintiffs.

G. P. Sanger, for the defendant.

Hoar, J. Upon the coming in of the master's report, both parties have alleged exceptions.

1. The plaintiffs except to the allowance of the sum advanced by Morrison & Co., on the consignment of the cargo of the Fraternidad, as a credit to the defendant. The correctness of this allowance depends upon the relation in which the parties stood to each other, and to the property which was the subject of account. They had been partners, and the partnership had expired. The plaintiffs undertook to pay the defendant for his interest in the partnership property, and continued the general business on their own account. An approximate estimate was

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made of the value of the defendant's interest in the adventures and transactions which were not then closed, and payments were made to him of the amount thus ascertained; but it was expressly agreed that these accounts should remain open and subject to future settlement, and that any gain or loss upon them should be credited or charged to him in the proportion which his share bore to the whole amount.

The effect of this contract was, that the partnership continued as to these unsettled accounts, and whatever was received by the plaintiffs upon them was received on behalf of the defendant, as well as on their own. It would then follow that, when Morrison & Co. made an advance on the bills of lading, the money thus received was on the joint account of the plaintiffs and defendant. He is liable with them to refund to Morrison & Co., if there has been an over payment. Although it appears that Morrison & Co. allowed a smaller sum than that which they advanced, as the proceeds of the cargo, yet the plaintiffs have not repaid the difference. If they should pay it, and when they pay it, if it is found justly due, they will be entitled to make a charge in account against the defendant based upon it. In the mean time, it is merely a liability on account of the adventure not yet discharged; and, until the plaintiffs discharge it, they cannot make any deduction from the amount of partnership property in their hands on account of it, or require the defendant to allow anything for it in a settlement.

The plaintiffs' second exception is the same in substance; and both are overruled.

2. The defendant excepted to the admission of certain depositions, on the ground that the caption and certificates did not show that the witnesses were properly sworn and examined. The depositions were originally admitted, subject to all objections. The hearings continued for six months afterward, and it was not until that time had elapsed, and all the evidence was in, that the defendant's counsel in his argument first suggested this objection. The objection was merely formal, and, if well taken, might have been obviated, if it had been seasonably brought to the notice of the party using the depositions. We think it must be considered as waived. But if it were now

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open, it could not be supported. It sufficiently appears that the deponents were sworn, and were examined according to the directions in the commission, and the defendant had an opportunity to cross-examine. Being taken under a commission, and out of the state, the statute allows them to be used in the discretion of the court, although all the formalities required in depositions taken within the state were not observed. Gen. Sts c. 131, § 37. *Stiles* v. *Allen*, 5 Allen, 320. *Bacon* v. *Rogers*, *ante*, 146.

The other exception is to the allowance of certain costs and expenses incurred by the plaintiffs in the prosecution of the same commercial adventure which was the subject of the plaintiffs' exception. It was correctly decided by the master. The plaintiffs had the same right to use their best judgment in incurring such expenses as seemed to be reasonable and necessary in settling the outstanding affairs of the partnership that they had while the partnership continued. Nor is the fact important, that the sum allowed by the master exceeds the sum stated in the acount annexed to the plaintiffs' writ. The objection does not appear to have been taken before the master. If it had been, the account might have been amended. Beside; this is a proceeding in equity, with a prayer for an account and for general relief. Any errors of the account as rendered may be corrected, if the parties are not thereby surprised or prejudiced.

All the exceptions to the master's report are therefore overruled, and the cause will stand for further proceedings and orders.

We do not see that in its present aspect the plaintiffs can be entitled to a final decree. While the claim of Morrison & Co. or the International Bank to a repayment of the excess of their advances, or any other debt of the partnership, remains unadjusted, the plaintiffs cannot recover of the defendant any sum as finally due in equity upon a complete and final settlement of the partnership affairs. This difficulty might be obviated, if, as in *Brinley* v. *Kupfer*, 6 Pick. 179, the amount were so small that the plaintiffs were willing to deduct it from the amount due to them.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF BERKSHIRE, SEPTEMBER TERM 1864 AT LENOX.

PRESENT:

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. EBENEZER R. HOAR,
HON. HORACE GRAY, JR., } JUSTICES.

MEMORANDUM. — On the fifteenth day of August 1864, the Hon. PLINY MERRICK resigned the office of Justice of this Court, which he had held since the twenty-ninth day of March 1853.

On the twenty-third day of August 1864, HORACE GRAY, Jr., Esquire, of Boston, was appointed a Justice of this Court, in place of Mr. Justice MERRICK, and took his seat on the bench on the first day of this term.

RUFUS L. T. POMEROY *vs.* JOHN D. TRIMPER.

It is not necessary, in a writ of replevin, which is directed to a deputy sheriff, to allege the value of the goods to be replevied.

A defendant in replevin, who has prevented the officer from delivering the replevied property to the plaintiff by attaching it upon a writ in his own favor, cannot object to the prosecution of the replevin on the ground of such non-delivery.

It is no ground for dismissing a writ of replevin, that an animal described in the writ as a heifer is described in the certificate of appraisement as a cow; or that the plaintiff has caused the officer, to whom the writ was committed, to bring an action against the defendant and another officer for taking the replevied property out of his hands, before its

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delivery to the plaintiff; or that the plaintiff, as executor, has commenced an action against the defendant and his officer for the conversion of the replevied property, if it does not appear that the conversion relied upon was the same act for which the replevin was brought.

REPLEVIN of "one brown heifer, one grey heifer," and other chattels. Writ dated April 7th 1860, and returnable at June term 1860 of the superior court.

The appraisement was of "the within named brown cow" and "the grey cow," and of the other chattels as described in the writ; and showed their value to be more than twenty dollars.

The officer in his return, after setting forth the appraisement of the property, and the taking of a bond from the plaintiff to the defendant, stated that he thereupon replevied the property; that while he was transporting it for the purpose of delivering it to the plaintiff, it was forcibly taken from him without his consent by Harvey Holmes, a deputy sheriff, by attachment on mesne process in favor of the defendant against the plaintiff, and therefore he could not deliver it to the plaintiff; and that he summoned the defendant by delivering to him a copy of the writ of replevin.

The defendant, in a motion to dismiss, filed at the first term, and also in his answer, set up the following grounds of defence:

1. That the writ alleged no values of the chattels replevied, and so did not show that they were of sufficient value to give the court jurisdiction.

2. That it appeared by the officer's return that there had been no complete replevy and delivery of the property described in the writ, and no sufficient service thereof.

3. That the appraisement was of other property than that described in the writ.

4. That the plaintiff had caused the officer who served the writ of replevin to bring an action of tort against this defendant and Holmes for the wrongful taking and conversion of the property replevied; which action was brought after the writ of replevin, returnable to June term of the superior court in Hampden and there entered and pending at and before the time of the entry of this action, and prosecuted for the benefit of this plaintiff.

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5. That on the 1st of May 1860 the plaintiff became the executor of the will of Elizabeth Van Allen, (who died before this replevin was sued out,) and thereupon, in his capacity of executor, brought several actions against said Holmes and the defendant for the conversion of the chattels named in the replevin, which were returned to and entered at June term 1860 of the superior court in Hampshire, and were still pending.

At February term 1861 this action of replevin was referred by rule of court in common form. The arbitrators found that the actions were brought and pending in Hampden and Hampshire, as alleged by the defendant, and that Elizabeth Van Allen died in 1857; and they awarded in favor of the plaintiff, subject to the opinion of the court upon the case above stated. The superior court accepted the award, and the defendant appealed to this court.

M. Wilcox, for the plaintiff.

I. Sumner, for the defendant.

'GRAY, J. 1. It is unnecessary in this case to inquire whether the general rule of the English law, that the value of goods replevied need not be alleged in the writ or declaration, would, under that law, extend to writs of replevin in the form used in this commonwealth. See Wilkinson on Replevin, 41; *Gibbs* v. *Bartlett*, 2 Watts & S. 35; *Root* v. *Woodruff*, 6 Hill, (N. Y.) 424, and authorities there cited; 5 Dane Ab. 521. For we are of opinion that in this commonwealth the rule is fixed by statute.

The statutes of the Massachusetts Colony declared that "every man shall have liberty to replevy his cattle or goods impounded, distreined, seized or extended," (without limit of value,) "unless it be upon execution after judgment, and in payment of fines." Body of Liberties of 1641, art. 32. Mass. Col. Laws, (ed. 1660,) 69; (ed. 1672,) 132. Anc. Chart. 184. The law of the Plymouth Colony was similar. Plym. Col. Laws, (ed. 1672,) 14; (ed. 1685,) 6; (ed. 1836,) 256. The form of writ published with the Massachusetts Colony laws, as well as those prescribed in the statutes of the Province, did not contain any allegation of value of cattle distrained or impounded, nor indicate that any such allegation was required in any writ

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of replevin. Mass. Col. Laws, (ed. 1672,) 162, 163. Prov. Sts. 13 W. III. (1701,) *c.* 13; 7 G. I. (1720,) *c.* 7; (ed. 1726,) 158, 289, 290. It may be that in the Province, as in the mother country, the writ of replevin, although allowed by law for any goods unlawfully taken, was not in use except for distresses or for impounded cattle. See Prov. Sts. 9 W. III. (1697,) *c.* 2, § 2; 10 W. III. (1698,) *c.* 4; (ed. 1726,) 86, 96; Wilkinson on Replevin, 2, 143; *Mellor* v. *Leather*, 1 El. & Bl. 628, 629, and authorities cited; *Mennie* v. *Blake*, 6 El. & Bl. 847.

But the first statute of replevins of the Commonwealth, after directing the mode of proceeding before a justice of the peace upon replevin of "cattle restrained or impounded," expressly authorized the suing out of a replevin from the court of common pleas, for "any goods or chattels taken, distrained or attached," "of the value of more than four pounds." And the same statute, which thus limited the writ to chattels above a certain value, established a form of writ, in which the chattels were directed to be "enumerated and particularly described," but were not required to be valued. *St.* 1789, *c.* 26, § 4. 5 Dane Ab. 515, 532. The later statutes substitute "twenty dollars" for "four pounds," and provide that the writ shall be substantially in the form heretofore established and used. Rev. Sts. *c.* 113, §§ 27, 28. Gen. Sts. *c.* 143, §§ 10, 11. These statutes are decisive that no allegation of value need be made by the plaintiff. And so the law is understood to be in Maine, under like statutes. *Thomas* v. *Spofford*, 46 Maine, 410.

The *St.* of 1789, *c.* 26, § 4, required the officer serving the writ to take a bond from the plaintiff to the defendant in twice the value of the goods, for the prosecution of the replevin to final judgment and the payment of any damages and costs recovered by the defendant; but did not prescribe any mode of fixing this value; and of course left the officer liable to an action, if he took insufficient security. *Ladd* v. *North*, 2 Mass. 516, 517. *Murdoch* v. *Will*, 1 Dall. 341. *Gibbs* v. *Bull*, 18 Johns. 435. *Kimball* v. *True*, 34 Maine, 84. *Jeffery* v. *Bastard*, 4 Ad. & El. 823. Under that statute a practice grew up, to some extent, of inserting a valuation in the writ, perhaps with a

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view of guiding the officer in fixing the amount of the security which he should require of the plaintiff. But the plaintiff, who expected in most cases to recover the goods specifically, and damages for their detention only, had no interest in setting the goods at their full value, and often undervalued them in the writ in order to diminish the penalty of his bond. To avoid this, and perhaps also to protect the officer, the *St.* of 1824, *c.* 106, § 1, provided that, whenever the defendant or the officer should suppose that a bond in a sum twice the value of the goods as alleged in the writ might be an insufficient security, the officer should cause them to be appraised by three disinterested persons, and return their appraisement on the writ, and take a bond to the defendant in double such appraised value. That statute only shows that a valuation had been sometimes inserted in the replevin writ, not that it was useful or necessary. And the reënactments of the provision do not mention any valuation in the writ. Rev. Sts. *c.* 113, §§ 20, 29. Gen. Sts. *c.* 143, §§ 4, 12.

There are several cases in which such an allegation has been made by the plaintiff, and, when made, has been held admissible against him in evidence of the value. *Clap* v. *Guild*, 8 Mass. 153. *Huggeford* v. *Ford*, 11 Pick. 224. *Barnes* v. *Bartlett*, 15 Pick. 79. *Swift* v. *Barnes*, 16 Pick. 196, 197. But it has been repeatedly held not to be conclusive evidence of the value of the property, even on the question of the jurisdiction of the court, nor to be in any way binding on the defendant. *King* v. *Dewey*, 11 Cush. 218. *Swift* v. *Barnes*, 16 Pick. 197. *Small* v. *Swain*, 1 Greenl. 135. *Thomas* v. *Spofford*, 46 Maine, 410.

An exception to the rule, established by the statutes above cited, that the writ need not allege the value, may perhaps exist where the writ is to be served by a constable, whose authority to do so is limited to cases in which the sheriff or his deputy is a party and the property does not exceed a certain value. Gen. Sts. *c.* 18, § 61. In such a case, Chief Justice Shaw said: "The authority to the constable is given only in specific cases, which must appear on the face of the writ." But the writ was

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dismissed, not for want of alleging the value, but for not showing that the sheriff or his deputy was a party. *Conner* v. *Palmer*, 13 Met. 303.

In the case now before us, if any allegation of value had been necessary, it might have been inserted by amendment, and its omission would have been waived by the general rule of reference. *Jaques* v. *Sanderson*, 8 Cush. 273. *Merrill* v. *Gold*, 1 Cush. 460. *Day* v. *Berkshire Woollen Co.* 1 Gray, 423.

2. There was no defect of service, of which the defendant can take advantage. The officer had caused the value of the property to be ascertained, and security to be given to the defendant, in the manner required by law, and had taken the property into his custody, when it was forcibly taken from him at the defendant's suit. It is well settled in England and in Pennsylvania, and, it would seem, in New York, that when the defendant wrongfully puts it out of the power of the officer to execute the writ and deliver the property to the plaintiff, the plaintiff may proceed in the cause, and recover damages for the full value of the property, as well as for the detention. Wilkinson on Replevin, 20, 43, 85. *Bower* v. *Tallman*, 5 Watts & S. 561. *Baldwin* v. *Cash*, 7 Watts & S. 426. *Snow* v. *Roy*, 22 Wend. 604. And we can have no doubt that such is the law of Massachusetts. This would have afforded a strong reason for requiring the value to be stated in the writ, if the statutes already cited had not clearly dispensed with any such allegation. As by our practice no declaration, other than is contained in the writ, need be or usually is filed, it would be strange if a writ sued out in the form prescribed by the statute could be rendered insufficient by the defendant's subsequent wrongful interruption of the service.

If the objection to the service could ever have availed the defendant, it was clearly waived by the reference of the action.

3. The court know no authority for considering a "heifer" to be misdescribed as a "cow," except in the single instance of interpreting a penal statute, which by using both words manifested an intention to distinguish the one from the other. *Rex* v. *Cook*, 2 East P. C. 616; S. C. 1 Leach, (4th ed.) 105.

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Freeman v. *Carpenter*, 10 Verm. 434. *Carruth* v. *Grassie*, 11 Gray, 211. In a case in the year books, a man brought replevin of a heifer (*juvenca*), and was afterwards nonsuit, and sued out his writ of second deliverance of a cow (*vacca*); to which the defendant's counsel objected on the ground of variance; but Fitzherbert, J. said: "The writ is good; for it may be that it was a heifer at the time of suing out the replevin, and that it is now a cow." Year Book, 26 H. VIII. p. 6, *pl.* 27. So here, if there were a well defined line between a heifer and a cow, the court could not upon this record infer that the animals in question had not passed it after the suing out of the replevin and before the appraisement. But our decision need not rest upon this, for the description in the appraisement directly refers to the writ, and clearly identifies the animals replevied.

4. The action brought by the officer who served the replevin, against the defendant and the officer employed by him to interrupt the service and take away the property, is between different parties and for a different cause, and therefore no bar to this action.

5. Upon the same principle, the action brought by the plaintiff as executor of Elizabeth Van Allen, not being shown to be for the same cause of action, cannot affect this case.

Judgment for the plaintiff affirmed.

Ansel Nichols *vs.* Ariel A. Prince.

A. and B., who were partners under the firm of A. & Co., contracted with C. for the delivery of certain stock and materials to them. After the delivery of a portion, B. sold *his* interest in the business and firm to D., who continued the same business, under the same firm, with A., taking from D. a written agreement "to discharge him from all liabilities on account of purchases of stock and materials as one of the original firm of A. & Co." The rest of the stock and materials was thereafter delivered by C., who did not know of the change in the firm, and A. afterwards gave to C. a note signed A. & Co. for a portion of the price, dated back to the time when A. and B. were in partnership. *Held*, that B., upon paying the note and balance of the account, might maintain an action upon the agreement against D., to recover the same.

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Nichols v. Prince.

A declaration upon an agreement to discharge the plaintiff from all liabilities on account of certain purchases, as one of a firm recently dissolved, which alleges that a certain note was due from the firm at the time when the agreement was made, is not sustained by proof that such a note was afterwards given for a liability of the firm; but an amendment may be allowed on terms, after the argument of exceptions in this court.

CONTRACT upon the following written agreement:

"Pittsfield, May 28, 1862. This may certify that I have this day bought of Mr. Ansel Nichols all his right and interest in the marble business in this town, including also one business wagon, for the sum of ninety-three dollars and eighty-six cents, agreeing furthermore to discharge him from all liabilities on account of purchases of stock and materials as one of the original firm of Joyner & Co. Ariel A. Prince."

The first count of the declaration alleged that the plaintiff, being a partner in the marble business with G. H. Joyner, under the firm of Joyner & Co., sold his interest in the firm to the defendant for the sum of $93.86; that the defendant thereupon executed the above agreement; that at the time of said sale Joyner & Co. were indebted to the firm of Adams & Allen in the sum of four hundred and thirty-one dollars, for purchases of stock and materials to be used in their said business; that Adams & Allen then held two promissory notes against Joyner & Co. given for said purchases of stock and materials, one of which was for $200, and the other for $118.35, and an account for $113.66; that at the time of the sale the said notes and account were included among the liabilities from which the defendant was to discharge him and save him harmless; and that the defendant has not saved him harmless therefrom, but the plaintiff has been compelled to pay the same.

The second count was for $451.60, money paid by the plaintiff to the defendant's use, "the same being for the same cause of action as first count."

At the trial in the superior court, before *Morton*, J., it appeared that the plaintiff and Joyner were in partnership together, under the firm of Joyner & Co., until the 28th of May 1862; that they gave orders to Adams & Allen for a quantity of materials and stock, amounting in all to $313.66, a portion of which, to the amount of $149.15, was delivered before said 28th of May;

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that on that day the plaintiff sold his interest in the business and firm to the defendant, who thereupon executed the agreement declared on, and continued the same business with Joyner under the same firm, until the 20th of June 1862, when he sold his interest to Joyner; that no notices of dissolution were given in either instance, nor was it shown that Adams & Allen had any knowledge of the plaintiff's withdrawal from the firm; that Adams & Allen delivered the residue of the stock and materials after the withdrawal of the defendant from the firm of Joyner & Co.; that the note of $200, which was dated May 22, 1862, and given on account of the said stock and materials, was first delivered to Adams & Allen by being mailed to them by Joyner, in a letter signed by Joyner & Co., on the 20th of June 1862, without the knowledge of the plaintiff or the defendant; and that the plaintiff paid the said note and balance of account, upon being sued therefor by Adams & Allen.

No question arose as to the note of $118.35.

The defendant contended that there was a variance between the averments of the declaration and the evidence; but the judge ruled otherwise, and instructed the jury that if the bill of $313.66 was ordered and contracted for by Joyner & Co., while the plaintiff was a member of the firm, such contract created a liability within the meaning of the defendant's agreement, though some of the articles were not delivered until after the withdrawal of the plaintiff from the firm; that the forwarding by Joyner of the note of $200 and its reception by Adams & Allen, under the circumstances of the case, did not extinguish the plaintiff's liability to Adams & Allen, or release the defendant from his obligation to protect the plaintiff therefrom, unless Adams & Allen received it as the note of the new firm, or agreed to receive it in discharge of the plaintiff's liability, and that, if the plaintiff's liability continued at the time of making the payment, such payment was not voluntary, and he would be entitled to recover.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

T. P. Pingree, Jr., (*J. D. Colt* with him) for the defendant.

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The order to Adams & Allen was but an offer, not accepted or refused, which might be withdrawn at any time before it was accepted; and therefore it did not amount to a contract. Chit. Con. 8. *M'Culloch* v. *Eagle Ins. Co.* 1 Pick. 278. It was an executory contract for articles not in existence, and no property passed till they were finished and delivered. *Blasdell* v. *Souther*, 6 Gray, 149. *Spencer* v. *Cone*, 1 Met. 283. *Mixer* v. *Howarth*, 21 Pick. 205. The giving of the note for $200 was a payment. *Melledge* v. *Boston Iron Co.* 5 Cush. 169. That note was not binding on the plaintiff. *Parker* v. *Macomber*, 18 Pick. 508. Story on Part. 505, 506. There was a variance between the averment and proof.

M. Wilcox, for the plaintiff.

Hoar, J. The defendant bought the plaintiff's interest in the marble business, which he was then carrying on as one of the firm of Joyner & Co., and made a written contract, by which he agreed "to discharge him from all liabilities on account of purchases of stock and materials as one of the original firm of Joyner & Co." At the time when the contract was made, the firm had contracted for stock and materials to the amount of $313.66, of which $149.15 had been already delivered, and the rest was delivered afterward. There can be no doubt that the whole was "a liability on account of purchases of stock and materials," within the meaning of the contract. The dissolution of the partnership could not free the plaintiff from the obligation to pay for goods which he had ordered, and which had been in part delivered.

The making of the note in the name of the firm after its dissolution was an unauthorized act of the other partner; and being received by the creditors without a knowledge of the dissolution, and upon the supposition that it was the note of the partnership to whom they had sold their goods, they might have disowned it, and sued the contracting parties upon the original cause of action. But the note was dated back to a time when the first partnership was subsisting, and they sued upon the note, and for the balance remaining due upon the account. If the plaintiff chose to treat this note as binding upon him, and

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as a payment by himself of so much of the account upon which he was liable, it certainly did no wrong to any other party in interest, and he might rightfully do so. His payment of the note, if the note were regarded as a payment *pro tanto* of the account, would be merely the payment in a new form of his original liability, and, so far as the defendant is concerned, could not be considered a voluntary payment. We therefore think that if the declaration had conformed to the facts proved, the defendant would have been liable.

But there is a technical variance between the declaration and the proof. The first count of the declaration avers that the note of $200 was due at the time when the defendant made his contract of indemnity. The second count is for money paid, but it refers to the first count for the particulars of the payment, and is stated as being for the same cause of action. An amendment is therefore necessary. But the case having been tried and rightly decided upon its merits, the amendment may be made after verdict, upon proper terms, without doing any wrong to the defendant. *Cleaves* v. *Lord*, 3 Gray, 66. *Stone* v. *White*, 8 Gray, 589.

If, therefore, the plaintiff shall file an amendment in conformity with the facts, in the superior court, it is to be allowed, and he can then have judgment upon the verdict, taking no costs since the trial. *Exceptions sustained.*

LANSFORD WHITE *vs.* ELIAS BALLOU & another.

The testimony of experts is incompetent to show whether the placing of wet staves upon the outside of an arch, in which a fire is kindled, is a safe and prudent method of drying them.

TORT to recover for the burning of a dry-house and certain personal property.

At the trial in the superior court, before *Vose*, J., it appeared that the arch of the dry-house consisted, at the top, of one

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thickness of brick, upon which a marble slab two inches thick was laid; and that the defendants, having the right to dry staves in the dry-house, placed some wet hemlock ones upon the marble slab and kindled a fire in the arch. A few hours after this fire had been replenished by the defendants, the building was discovered to be on fire, and was destroyed. The evidence was conflicting as to the manner in which the building took fire, and as to the degree to which the marble slab would become heated by the fire in the arch. The plaintiff asked certain witnesses who had been employed in and taken charge of the dry-house for a considerable length of time, whether in their opinion the placing of staves upon the top of the arch was a prudent and safe mode of proceeding. This evidence was objected to and excluded.

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

H. W. Bishop, for the plaintiff, cited *Vandine* v. *Burpee*, 13 Met. 288; *Webber* v. *Eastern Railroad*, 2 Met. 147; *Davis* v. *Mason*, 4 Pick. 156; *Buffum* v. *Harris*, 5 R. I. 243; *Price* v. *Powell*, 3 Comst. 322; *Smith* v. *Gugerty*, 4 Barb. 614; *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. 72; *Malton* v. *Nesbit*, 1 C. & P. 70.

T. P. Pingree, Jr., (*J. D. Colt* with him,) cited 1 Greenl. Ev § 440; *Mulry* v. *Mohawk Valley Ins. Co.* 5 Gray, 545; *Rich* v. *Jones*, 9 Cush. 337; *Campbell* v. *Rickards*, 5 B. & Ad. 840.

Metcalf, J. Whether it was safe to place staves or other combustible materials on the top of the arch in the plaintiff's dry-house was, in our judgment, a question on which the opinion of experts was not admissible in evidence to the jury. In *New England Glass Co.* v. *Lovell*, 7 Cush. 321, Chief Justice Shaw said, that "in applying circumstantial evidence which does not go directly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two distinct duties to perform; first, to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. This inference depends upon experience. When this experience is of such a nature that it may be presumed to be within the common experience of all men of common education,

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moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inferences." He further said that the opinion of a witness is admissible, "because a man's professional pursuits, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, when men of common experience, after all the facts proved, would be left in doubt." See also *Perkins* v. *Augusta Insurance and Banking Co.* 10 Gray, 322, 324. This statement of the law is decisive, we think, that the court rightly excluded the offered testimony of the opinion of the two witnesses called by the plaintiff as experts. The issue on trial was, whether the defendants were guilty of actionable negligence in the use of the plaintiff's dry-house. The placing of hemlock staves on the top of the arch in that house was a fact on which the plaintiff relied as proof of such negligence. Whether this was such negligence depended on the degree of heat produced there by the use which the defendants made of the fire in the house; of which the exceptions show that the testimony was conflicting. But whatever the jury may have believed to have been the degree of heat on the top of the arch, their common experience would have enabled them to draw the inference, whether it was safe or unsafe to place staves there; and the opinion of experts was inadmissible. *Exceptions overruled.*

SELAH DOUD *vs.* MOSES HALL.

Evidence that a party to a suit was, at the time of the trial, nearly seventy years old, had had a paralysis within three years, was of weak mind and poor memory, had an idiotic look, was sometimes stupid, but brighter some days than others, and that on one occasion within a few days of the trial he was unable to move or dress himself and did not seem to understand anything about his business, does not so clearly show that he was insane, within the meaning of Gen. Sts. c. 131, § 14, as to require this court to grant a new trial on account of the admission of the other party to testify in his own favor.

CONTRACT against the maker of a promissory note.

At the trial in the superior court, before *Vose*, J., the plaintiff

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was called as a witness to testify in his own favor, to which the defendant's counsel objected on the ground that the defendant was insane, and offered the following testimony:

Dr. Julius A. Rising, the family physician of the defendant for many years, testified that the defendant was between sixty-five and seventy years old; that in December 1861 he had a paralysis; that he was of very weak mental capacity, and had a feeble memory and an idiotic look; that within a few days before the trial, upon being asked how old he was, he hesitated and did not reply; that he could not understand an inquiry whether he recollected giving a note to the plaintiff, and finally said he did not know about giving such a note, and remarked that the present suit troubled him, and his eyes filled with tears. Another witness testified that about ten days before the trial the defendant was unable to move or dress himself alone, was "all of a tremble" and did not seem to understand anything about his business; that sometimes he was very stupid, and gave no indication of his natural wants; but was brighter some days than others.

Upon this evidence, the judge, being of opinion that the defendant was not insane, within the meaning of Gen. Sts. *c.* 131, § 14, permitted the plaintiff to testify; and the jury returned a verdict for the plaintiff. The defendant alleged exceptions.

B. Palmer, for the defendant.

A. J. Fargo, for the plaintiff.

Metcalf, J. By the Gen. Sts. *c.* 131, § 14, "where one of the original parties to the cause of action on trial is dead, or is shown to the court to be insane, the other party shall not be permitted to testify in his own favor." On the trial of this case, evidence of the defendant's insanity was offered and received, for the purpose of excluding the testimony of the plaintiff. The judge was of opinion that the defendant was not insane, and allowed the plaintiff to testify in support of his action. As all the testimony concerning the defendant's insanity at the time of the trial is reported in the bill of exceptions, the decision of the judge is rightfully before us for revision. *Quinsigamond Bank* v. *Hobbs*, 11 Gray, 250. But we are of opinion

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that, though the evidence shows great weakness of the defendant's mind, yet it does not so clearly show his insanity as to require us to sustain the exceptions.

Exceptions overruled.

JAMES ANDREW *vs.* NORMAN SPURR.

A grantor of land cannot maintain a bill in equity to reform his deed, by inserting therein a reservation which was included in the oral agreement between the parties, if the omission to insert it does not appear to have occurred through fraud, accident or mistake, but in consequence of his relying upon the promise of the grantee to carry out the oral agreement. Nor, in such case, can relief be granted to the plaintiff on the ground that the defendant's refusal to perform his promise is fraudulent.

BILL IN EQUITY brought to reform a deed of land from the plaintiff to the defendant, dated in February 1861, by inserting therein a reservation of the right to cut and remove certain trees standing thereon. The plaintiff held the premises under a deed from Salmon K. Norton to him, which contained the same reservation which he sought by this bill to have inserted in his deed to the defendant.

At the trial in this court, before *Metcalf*, J., issues were framed for the jury on the following allegations in the bill: "1. That, before and at the time of the execution of the plaintiff's deed to Spurr, it was understood and agreed between the parties that the wood, &c., as reserved to Norton in his deed, was not to be included in the conveyance. 2. That by misunderstanding and mistake between the parties the wood reserved by Norton was not reserved in the said deed from Andrew to Spurr."

The plaintiff testified as follows: That, in the preliminary negotiations, he informed the defendant of the reservation in the deed from Norton to him, and of Norton's right to remove the timber, and the parties thereupon agreed upon the terms of the sale; that they went together to a justice of the peace, and requested him to draw the deed; that the justice asked for the deed of Norton, but, as it was not present, it was concluded to describe the

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land by bounding it upon the adjoining owners; that the justice, while drawing the deed, overheard some talk of the reservation, and asked what it meant, and, upon being informed, said that a new deed had better be made. The defendant said he did not see how he could wait. The plaintiff inquired if it would make any difference whether the reservation was put in or not, as the trees would soon be cut off, and the defendant and he had a perfectly good understanding about it. The justice replied that it would make no difference if they were ready to carry out their contract as they understood it, but thought it better to have a new deed. The plaintiff asked the defendant if it would make any difference on his part, and the defendant replied that it would not. The plaintiff said that the defendant would deal honestly and uprightly by him. There was considerable talk about inserting an interlineation in the deed. The plaintiff proposed putting in this clause: "Being the same I purchased of Salmon K. Norton," and referring to the old deed. The plaintiff stated that he left, supposing it would be put in and was put into the deed, and was thunderstruck when he was informed, after the commencement of a suit against him upon the covenants of his deed, that it was not. The deed was read over to him after it was written, at the closing up; he was not positive whether it was before the talk last narrated.

The justice testified substantially as follows: "At the time when the deed was drawn, and I had nearly completed it, I heard something said as to a reservation of wood, and, upon inquiry, both the plaintiff and the defendant informed me that there was such a reservation, and pointed out upon a plan the portion covered by the reservation. I said, I thought the reservation should be in the deed. The plaintiff asked if it would not be enough if it was inserted in the deed as being the same premises conveyed to him by Norton, and referring to the deed. I think I stated that it would be of no avail, unless the reservation was in. I took the deed to put something in as to the reservation. The plaintiff turned to the defendant and asked if it would make any difference whether that was put into the deed or not. The defendant made no reply at first, but, upon the

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plaintiff's repeating it, said, 'No, not as I know of.' I think I then took up the deed and said I thought I had better put in a clause including the reservation. The plaintiff wanted to know if it would make any difference. I told him, No, if they carried out their contract in good faith, but that all reservations should be in deeds, as they were matters of record. I think the reason why it was not put into the deed was, because we did not agree as to the words. In consequence of the parties agreeing that it was not necessary to put it into the deed, I did not put it in."

There was some further evidence to show that the defendant understood that he was not to have the trees in question.

Upon this evidence the plaintiff rested, and the judge, being of opinion that it did not sustain the issues, and would not justify the entry of a decree reforming the deed, took the case from the jury, and reported it for the determination of the whole court.

J. D. Colt & T. P. Pingree, Jr., for the plaintiff. It is plain that the deed in this case fails to meet the clear intention and agreement of both parties, by reason of the misdescription of the premises. Mistakes in the description of the estate to be conveyed are frequently and readily corrected in equity. 1 Story on Eq. §§ 155–157. *Canedy* v. *Marcy*, 13 Gray, 377. *Sawyer* v. *Hovey*, 3 Allen, 331. Unguarded confidence, undue haste, surprise, actual mistake in fact as to the insertion of a clause referring to the old deed, and other circumstances, conspired, in a way not now to be comprehended, to produce the result; and the only question is now, not how the mistake happened, but whether the deed as made does in fact defeat the intention of both parties. 1 Story on Eq. §§ 134, 155–157. *Joynes* v. *Statham*, 3 Atk. 388. *Ramsbottom* v. *Gosden*, 1 Ves. & B. 168. *Townshend* v. *Stangroom*, 6 Ves. 336. *Gillespie* v. *Moon*, 2 Johns. Ch. 596. *Sawyer* v. *Hovey*, 3 Allen, 331. The mistake as to the reference to the old deed was material, because it formed a part of the description of the premises.

M. Wilcox, for the defendant.

Bigelow, C. J. The most liberal doctrine of equity, applicable to the correction of mistakes in written contracts, cannot

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be made to embrace a case such as the evidence offered by the plaintiff at the trial tended to prove. If it be admitted that oral evidence is competent to show that through mistake or ignorance of facts, or even of law, a particular clause in a contract was inserted, or a material stipulation was omitted, and that a court of equity will, upon such proof, without any evidence of fraud or collusion, correct and reform a written instrument, and cause it to be carried into effect according to the terms of the agreement as verbally understood and assented to — if such be the rule on which courts of equity proceed in administering remedies under this branch of their jurisdiction — still the plaintiff fails to bring his case within the scope of its operation. The evidence not only does not show that there was any mistake in the terms of the deed as it was written by the scrivener, and as it was executed and delivered by the plaintiff, but it tends to prove that the particular reservation which he now seeks to incorporate into the deed was omitted with his knowledge and assent, and that he was willing to rely on the verbal agreement of the defendant that the rights of the parties should not be affected by its omission. It appears by the testimony of the scrivener that the plaintiff was informed by him that the reservation as to the right to take wood from the premises ought to be inserted in the deed; that it was left out because its precise terms were not agreed on; that the plaintiff inquired whether its omission would make any difference, and was told it would not, if the parties were willing to carry out their verbal agreement in good faith; and that, after this suggestion was made, he did not insert any clause relating to the right to take off the wood, "the parties agreeing that it was not necessary to put it into the deed." This explicit statement of an intelligent and impartial witness, whose credibility there is no valid reason to doubt, is entitled to confidence and belief, in preference to any conflicting assertion of the plaintiff. The latter is under the strong bias of a party who has a considerable pecuniary interest involved in the issue of this suit. Nor is his testimony altogether consistent with itself. He states that he supposed a reference to the deed under which he held the estate was inserted

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in the deed to the defendant, for the purpose of incorporating into the grant the reservation of the right to take off the wood. This is contradicted by the evidence of the scrivener, and is not easily to be reconciled with the previous statement of the plaintiff, that he inquired whether the insertion of a clause relating to the reservation would make any difference, and, on being told by the scrivener and the defendant that it would not, if the defendant would fulfil his verbal agreement, replied that he thought the latter would deal honestly by him. This was certainly equivalent to an assent to the omission of such clause from the deed, and the scrivener so understood it. The plaintiff also testifies that the deed was read over to him after it was finished, "at the closing up." It is difficult to believe, if the alleged clause was to have been inserted in the deed, that he would not then have noticed its omission, especially as his attention had just been specially called to the subject.

On a careful weighing of the evidence, it seems to us that the real object of this suit is to do that which the plaintiff agreed should not be done — that is, to cause a stipulation to be inserted in the deed, which it was understood should be left to rest in the oral agreement of the parties. We know of no principle on which a party can ask a court of equity to insert in a written instrument a clause which he well knew was not in it when he executed and delivered it, and which was omitted therefrom with his voluntary and intelligent assent. In such case there is no accident, mistake or fraud on which to found a claim to equitable relief. Inasmuch as the plaintiff was willing to trust to the verbal agreement of the defendant for that which he well knew ought to have been inserted in the deed, he cannot ask the interference of a court of equity to restore him to that which he lost through his misplaced confidence.

Parties cannot be compelled to put their oral agreements in writing. It is only when they enter into written contracts, and material stipulations are erroneously framed or wholly omitted by accident, mistake or fraud, that equity will reform instruments and make them conform to the original intention and agreement of the parties. Suppose a promissory note was

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given by a party, payable on demand, and the parties orally agreed that payment should not be enforced for a specified period of time; would a bill in equity lie to reform the note, and to carry into effect the verbal agreement? Or if a person agreed to buy merchandise to the amount of fifty dollars and upwards, of which there was no written agreement or memorandum made or contemplated by the parties; could the purchaser be compelled by a decree in equity to sign such an agreement as would constitute legal evidence of the contract? In such cases it is obvious that equity can grant no relief, because the parties stand in the precise position in which they were left by their oral agreement. So it is in the case at bar; the plaintiff, having voluntarily consented to allow a material stipulation to be omitted from the deed, cannot ask to have it inserted by a decree of this court.

The view which we have taken of this case is fully supported by the weight of authority. The leading case of *Irnham* v. *Child*, 1 Bro. C. C. 92, is not unlike the case before us. There an annuity was granted by deed; it was verbally agreed between the parties that it should be redeemable; but this stipulation was omitted from the deed by the mutual assent of the parties, lest it should make the whole contract usurious and void. It was held by Lord Thurlow, on a bill brought to supply this omission, that, as the omission was not the result of fraud or mistake, it could not be supplied by parol evidence. *Portmore* v. *Morris*, 2 Bro. C. C. 219. *Townshend* v. *Stangroom*, 6 Ves. 328, 332. *Croome* v. *Lediard*, 2 Myl. & K. 251. *London, &c. Railway* v. *Winter*, 1 Craig & Phillips, 59. *Phillips* v. *Eastwood*, Lloyd & G. (*temp.* Sugden) 270, 288. 1 Story on Eq. § 154. The whole doctrine on this subject, with its exceptions and qualifications, is clearly stated and the authorities fully collected in 2 White & Tudor's Lead. Cas. in Eq. (3d Amer. ed.) 670, by the learned American editors, in the note to *Woollam* v. *Hearn*.

It was suggested by the counsel for the plaintiff that, if this bill could not be supported on the ground of accident or mistake, it might be maintained as a bill for relief against fraud. But there is no evidence of fraud on the part of the defendant

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except that he refused to keep his oral agreement. This is clearly no reason for reforming a contract which was entered into fairly, and which was fully understood by both parties.

Bill dismissed.

JOHN LEA *vs.* HELEN A. LEA.

If a married woman leaves her husband with his consent, and remains absent five years, this is not such a desertion as will entitle him to a divorce.

LIBEL for divorce for the cause of desertion for five years. At the trial in this court, before *Metcalf*, J., the jury were instructed that if they should find that the respondent left her husband with his approbation, wishes or consent, it did not constitute a desertion in law. The jury returned a verdict for the respondent, and the libellant alleged exceptions.

J. D. Colt, for the libellant. A consideration of all the provisions of Gen. Sts. *c.* 107, § 7, shows that the word "desertion," as there used, has a peculiar meaning, different from its common acceptation and the meaning attached to it by legal writers. In this statute, it means the act of purposely abandoning the society and dwelling of the other party, whatever the disposition of the party abandoned may be. Desertion is spoken of as possible, though the party deserting may be driven away by extreme cruelty and neglect; and, if so, the desertion intended by the statute may also take place, although it is by the consent of the one who is deserted. It is an offence against society, for which the legislature intended to enact that a divorce may be granted. The provision in *St.* 1838, *c.* 126, § 1, requiring that desertion should be without the consent of the party deserted, was left out of the later statute with a view to change the law. Besides; the instructions in this case limited the consent to the time when the respondent left her husband. They should at least have required the jury to find that his consent to her absence extended over the whole period.

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I. Sumner & M. Wilcox, for the respondent, were stopped by the court.

Bigelow, C. J. The learned counsel for the libellant does not contend that the word desertion, either in its ordinary or technical sense, is properly applicable to a case of departure from the society or service of a person with his knowledge and assent. Certainly in legal phraseology the word is uniformly used to denote a wilful abandonment of an employment or duty, in violation of a legal or moral obligation. A soldier is said to desert his post, a sailor his ship, an apprentice his master, when they depart from the service to which they are bound, without permission or contrary to orders. Admitting such to be the proper and ordinary signification of the word, the counsel contends that it is used in a different sense and is to receive a different interpretation in that provision of the statutes which authorizes this court to grant a divorce "when one party has deserted another for five years consecutively." Gen. Sts. *c.* 107, § 7. But we are unable to see any plausible ground on which the construction of the language of the legislature which the counsel urges on our attention can be supported. Certainly there is nothing in the previous history of the legislation on this subject which gives any countenance to the suggestion that the legislature intended to give authority to dissolve the bond of matrimony in all cases where a husband or wife had departed from the other with his or her voluntary assent. In *St.* 1838, *c.* 126, § 1, it was expressly provided that the desertion should be "without the consent of the party deserted." This clause was omitted in *St.* 1857, *c.* 228, § 2, for two very obvious reasons. In the first place, it was superfluous; the word "desertion," as has been already stated, of itself implying that the separation was not with the assent or permission of the party deserted, but the contrary. In the next place, by *St.* 1857, *c.* 228, § 2, the legislature intended to provide that in two special cases the party deserting might maintain a libel for divorce from the bond of matrimony; that is, where a party had left the abode of the other on account of his or her extreme cruelty, or the desertion of the wife was caused by the gross or wanton and cruel neglect

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of the husband to provide suitable maintenance for her, it was enacted that the bond of matrimony might be dissolved on the libel of the party deserting, after the separation had continued for five consecutive years. In embodying into one section a provision embracing these two cases, as well as the common one of a desertion for five consecutive years, as valid grounds of divorce, it was of course necessary to omit the words of *St.* 1838, *c.* 126, requiring the desertion in all cases to be without the consent of the party deserted. This is the explanation of the phraseology of the provision, as it appears in *St.* 1857, *c.* 228, § 2, and as it was reported by the commissioners and enacted in the General Statutes. No further alteration in the law was thereby contemplated. The purpose was simply to embody in a single clause the enactments in relation to a divorce from the bond of matrimony on the ground of desertion. Looking at it in that light, it is clear that every word of the section has full effect and operation, without resorting to any strained construction of any part of it, or giving to the word "desertion," as there used, any new or forced signification. The first clause enacts in substance that desertion for five consecutive years shall be a valid ground for divorce; the second clause or proviso applies to and includes only the two cases before referred to, and is intended to give to the party deserting in those cases the right to file a libel for divorce; or, to put it in another form, the statute is in substance this: desertion shall constitute a valid ground for divorce, provided that where the libel is filed by the party deserting it must be made to appear that the desertion was caused by the extreme cruelty of the party deserted, or by the neglect of a husband to furnish suitable maintenance for the wife. This interpretation of the statute not only gives full force and effect to each and every part of the enactment, but it is consistent with the policy of the law, as it has always been understood and administered in this commonwealth, by which the marriage tie is held to be indissoluble, unless it can be shown that there has been a breach of duty and violation of the contract by the party against whom a divorce is sought to be obtained. There is no such breach or wrongful act where a

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husband or wife leaves the other with his or her full and voluntary assent. It would require very explicit language to convince us that the legislature intended to reverse this well settled and salutary policy. Certainly we should be slow to arrive at a conclusion by implication from doubtful or equivocal language, that a separation by consent of both parties, however long continued, would of itself furnish sufficient ground for a dissolution of the bond of matrimony. Such a provision of law would fall but little short of giving a direct sanction to a mode of obtaining a divorce by collusion between the parties.

For these reasons, we are of opinion that no desertion by the wife was proved at the trial, according to the allegation in the libel. She left her husband with his assent, and, in the absence of evidence to the contrary, the presumption is that her absence was continued under that assent up to the time of filing the libel. The ruling of the court was entirely right, and the order must be, *Libel dismissed.*

LYDIA HATHAWAY & another *vs.* EDWIN THAYER & others.

A bill in equity does not lie to correct an error in the report of commissioners appointed to make partition of the real estate of a deceased person, thirteen years after its acceptance and confirmation by the probate court, especially if such bill does not allege that the defendants, who claim title to the premises in dispute as purchasers, knew of the error at the time when they acquired their title.

BILL IN EQUITY, brought in March 1863, alleging that the plaintiff, Lydia Hathaway, is a daughter of John Page, late of Clarksburg, deceased; that his estate was administered upon in Berkshire county, and commissioners who were appointed to make partition of the real estate among his heirs, and those entitled thereto, made a report, setting out to the various children of said John their various shares of his real estate; that in describing the share intended to be set out to said Lydia they made a mistake in the courses, distances and bounds, so that a

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lot of about twenty-one acres, which was intended to be set out to her, was not included in the description of the land set out to her, but was included in the description of the land set out to Lillis Page, her sister; that this report was accepted and confirmed in the probate court in August 1849; that the plaintiffs did not discover the error till recently, long after the right of appeal from the decree of the probate court had expired; that Edwin Thayer, of Ohio, now claims title to said twenty-one acres, Lillis Page being dead, and has entered thereon and cut trees, and has bargained and sold them to third persons. The prayer was, that the report of the commissioners might be opened and corrected, and that the defendants might be ordered to account, and for an injunction. The defendants filed a general demurrer.

H. L. Dawes, for the defendants.

A. J. Waterman, (*F. O. Sayles* with him,) for the plaintiffs.

Dewey, J. 1. This bill cannot be sustained against any of the defendants. It states no case which authorizes this court to interfere with the partition made by the probate court. If the judgment of that court was erroneous, the proper remedy was by appeal. This court, under a proceeding like this, would not assume to correct alleged mistakes of commissioners appointed to make partition, whose doings were adopted by the probate court, and a decree of partition thereupon ordered.

2. The time that has elapsed since making the partition presents a strong case of laches on the part of the plaintiffs. The error, if any exists, was indicated by the return of the commissioners, and to be seen by an examination of the public record, by the parties in interest.

3. The bill is also liable to the further objection that it contains no allegation that the parties who have acquired an estate in the portions set off in severalty by the decree of partition had any knowledge of the alleged mistakes in the report of the commissioners, before they acquired their title.

Demurrer sustained.

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JOHN CRONIN & wife *vs.* LEONARD RICHARDSON & another.

If the grantor in a deed describes the granted premises in general terms, and reserves the wood and timber "on said premises, south of the meadow or low land," the reservation includes the wood and timber upon all of the granted premises which lie further to the south than the meadow, and is not limited to that upon the portion of the premises lying directly south of the meadow.

TORT for breaking and entering the plaintiffs' close, and cutting and removing trees therefrom. At the trial in the superior court, before *Rockwell*, J., a verdict was returned for the plaintiffs, and the defendants alleged exceptions to rulings of the judge, which are sufficiently stated in the opinion.

J. D. Colt & T. P. Pingree, Jr., for the defendants, cited 2 Washburn on Real Prop. 632, 641; *Flagg* v. *Thurston*, 13 Pick. 150; *Sumner* v. *Williams*, 8 Mass. 174; *Doe* v. *Meakin*, 1 East, 458.

W. G. Bates & B. Palmer, for the plaintiffs, cited 2 Washburn on Real Prop. 631; *Harlow* v. *Thomas*, 15 Pick. 66; *Brandt* v. *Ogden*, 1 Johns. 156; *Jackson* v. *Reeves*, 3 Caines R. 293.

GRAY, J. The decision of this case turns upon the construction of the reservation in the deed to the plaintiffs from Erasmus D. Beach, (whose title the defendants have,) of a farm in Sandisfield, "lying on the south side of the highway leading to Marlborough, and bounded as follows, to wit: northerly on said highway, westerly on land formerly owned by Eliakim Hall, deceased, southerly on land formerly owned by Reuben Smith, deceased, and easterly on land formerly owned by John Sears, deceased, and the Kilbourns; reserving to the said Beach all the wood and timber of every description standing and growing on said premises south of the meadow or low land through which the brook runs; with the right to enter upon said premises wherever most convenient, to cut, cord and carry off said wood and timber, and for such length of time as the said Beach, his heirs and assigns, may desire."

By the plans and evidence introduced at the trial in the superior court, it appeared that the farm was nearly in the shape of

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two squares, adjoining one another, the northernmost of which was by half its width further towards the east than the southernmost; that, near the place where these two squares joined, the farm was traversed by a brook flowing from west to east, through low land varying in width, on part of which alders grew, and to the northward and southward of which the ground rose abruptly towards the northern and southern ends of the farm; and that wood and timber grew on the southern part of the farm, the only access to which for teams was by a path across the brook and low land.

The defendants, under the reservation, claimed the right of cutting wood and timber over the whole of that part of the farm which lay further towards the south than the brook and low land. But the presiding judge instructed the jury that this right was limited to so much of the farm as lay "directly south," or, in other words, "between two due south lines drawn from the southeast and southwest corners of the meadow or low land, if those corners were respectively as far east and west as any part of the land."

The court are of opinion that this instruction cannot be supported, and entitles the defendants to a new trial. The boundaries in the deed describe the whole farm as one parcel, in the most general terms, and are followed by a reservation of "all the wood and timber of every description standing or growing on said premises south of the meadow or low land through which the brook runs." The word "south" is not here used, as in the New York cases cited for the plaintiffs, to designate the course of a boundary line, but to indicate the position of the reserved wood and timber, as compared with the meadow or low land, and to except out of the grant all the wood and timber growing southwardly of, or more to the southward than, the low land between the two ascents. The purpose may be said, in geographer's phrase, to have been rather to establish a parallel of latitude, north of which wood should not be cut, than to confine the right of cutting wood between certain lines of longitude. This low land is thus made the northern boundary of that portion of the farm on which the grantor reserves the

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right to cut wood; and of course excludes any right to cut trees, whether growing singly or together, on the northern part of the farm, or the alders growing on the low land.

Exceptions sustained

NORMAN W. SHORES *vs.* WILLIAM J. CARLEY & others.

A man has no interest as tenant by the curtesy in land which his wife owns in remainder or reversion, subject to a life estate; and he can convey no title thereto, which will be valid against a subsequent levy thereon of an execution against him and his wife.

WRIT OF ENTRY, brought June 8th 1863, to recover possession of a parcel of land from William J. Carley, Jr., Elizabeth Carley, his wife, and William J. Carley.

At the trial in the superior court, before *Morton*, J., it appeared that Elizabeth became the owner of the reversion of an undivided portion of the premises before her marriage, and that in 1856, after her marriage, she became the owner of the reversion of the residue, the whole premises being subject to a life estate in Elijah Carley. In March 1860 William J. Carley, Jr. conveyed his alleged interest in the premises to William J. Carley. In June 1861 the demandant duly levied upon the premises an execution against William J. Carley, Jr. and Elizabeth. In March 1863 Elijah Carley died. The judge ruled that this action could not be maintained, because of the deed from William J. Carley, Jr. to William J. Carley, and directed a verdict for the tenants, which was accordingly rendered The demandant alleged exceptions.

I. Sumner, for the demandant.

J. E. Field, (*M. Wilcox* with him,) for the tenants.

BIGELOW, C. J. There are no facts stated in these exceptions which tend to show that the demandant did not acquire a good title to the demanded premises under the levy of his execution, or that he had not a right of entry therein on the day when this action was brought. His execution was against William J

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Carley, Jr. and Elizabeth Carley, his wife, who was entitled to the whole estate on the death of her father. Her interest therein, at the date of the levy, whether in remainder or reversion, was liable to be seized on execution; Gen. Sts. *c.* 103, § 1; and it was duly set off to the demandant, subject to the life estate of her father. On her father's death, the demandant had a right of immediate entry under his levy. The conveyance by the husband of Elizabeth prior to the levy passed no title to his grantee. He then had no right or interest in the premises which could be conveyed by him. The only interest which he could have in any land held by his wife would be that of tenant by the curtesy. But this interest he could not acquire in the demanded premises during the continuance of the life estate therein of her father. The rule of law is well settled that a man cannot be tenant by the curtesy of a remainder or reversion. Co. Litt. 29 *a.* 3 Preston on Abstracts of Title, 382. *Stoddard* v. *Gibbs*, 1 Sumner, 263. The reason of the rule is, that in such case one of the essential elements of a title by curtesy is wanting. The seisin of the wife must be a seisin in deed, that is, an actual seisin or possession of the estate, to give the husband a right by curtesy. There can be no such seisin of a reversion or remainder, expectant on the termination of a freehold estate in another. Of such an estate, the wife can have only a seisin in law, or constructive seisin. It follows, that at the time of the conveyance of the demanded premises by the husband of Elizabeth, he had acquired no interest in the estate which could pass by his deed, and there was no outstanding estate or right in his grantee which could operate to prevent the maintenance of this action.

Exceptions sustained.

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HIRAM CLARK & another *vs.* SOLOMON GARFIELD.

It is not reasonable care and prudence in a guardian to invest his ward's money in the note of a single person or a single firm, in active business, without security, unless extraordinary circumstances are shown to justify such an investment; and if a loss occurs in consequence thereof, he will be held responsible for it.

APPEAL from a decree of the judge of probate, allowing a guardian's claim for a loss to his ward's estate, which occurred under the following circumstances:

The guardian was appointed in 1834, and in 1845 he took a note against his son, John M. Garfield, for $1200, in payment for a farm belonging to his ward's estate. In 1859 and 1860 the son held two notes, one for $457.76 and the other for $173, each payable in six months, against Platner & Smith, who were paper manufacturers in good credit and doing an extensive business. These notes were transferred before their maturity to the guardian, who paid a portion of their amount in money of his ward, and indorsed the residue upon the note for $1200. The guardian then supposed that the notes of Platner & Smith would be punctually paid; but they afterwards failed, and a compromise was made by which a loss of $370.95 was sustained.

H. W. Bishop, for the appellant, cited *Harding* v. *Larned*, 4 Allen, 426, and cases there cited; *Wormley* v. *Wormley*, 8 Wheat. 421; *Smith* v. *Smith*, 4 Johns. Ch. 281; *Monell* v. *Monell*, 5 Johns. Ch. 297; *Caffrey* v. *Darby*, 6 Ves. 488; *Powell* v. *Evans*, 5 Ves. 839; *Pocock* v. *Reddington*, Ib. 794.

M. Wilcox, for the appellee, cited, in addition to some of the above cases, *Brown* v. *Dunham*, 11 Gray, 42.

HOAR, J. There is nothing in the facts agreed which leads us to doubt the good faith of the guardian in making the investment which has resulted in a loss to his ward's estate. Nor do we question the rule for which his counsel contends, that if a trustee acts with good faith and a sound discretion in the investment of trust funds, he is not to be held responsible for

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any loss which may happen. There is no other restriction, in this commonwealth, upon the kinds of investment which a trustee may make, than that which this rule implies. *Harvard College* v. *Amory*, 9 Pick. 446. *Lovell* v. *Minot*, 20 Pick. 116.

But the facts show that the guardian invested a considerable sum belonging to his ward's estate in a note of his son, which he held, and which was wholly unsecured. In payment of this note he took the note of a manufacturing firm, who were at the time in perfectly good credit, but without taking any other security, not even the indorsement or guaranty of his son, from whom he received it. The question is, was this the exercise of a sound discretion? We can have no doubt that it was not; and no case has been cited in which such an investment was ever sanctioned by a court. We think that to allow it would furnish a precedent of the most dangerous character, and would open a wide door to fraud. Such a note would not be taken by any bank of discount, much less by any savings bank; though the investments of savings banks, being regulated by statute, do not afford a precise standard of comparison. The transaction puts the property of the ward at the risk of the business of the partnership, without any corresponding chance of profit.

We do not mean to decide that personal security is of itself insufficient; nor even that in no possible case could the promissory note of a single person be taken by a trustee. But under the circumstances which this case discloses, involving a sum large enough to require secure investment, and where there was nothing apparently to prevent the taking of other security, to put the property of a ward at the hazard of the solvency of a single individual or firm engaged in active business cannot be considered the exercise of due caution or of a sound discretion on the part of a guardian; and, a loss having ensued, he must be held responsible for it.

Decree of the judge of probate reversed.

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EMMONS ARNOLD & another *vs.* WILLIAM F. RORABACK.

In an action on a judgment rendered in another state, on which an execution has there been returned satisfied in part only, the plaintiff can recover no more than the sum for which it was returned unsatisfied, although damages have been recovered against the officer who served it, for seizing and selling thereon property not liable thereto, the avails of which sale were included in the sum for which he returned it satisfied, and although by the law of the state in which the judgment was rendered (as in this commonwealth) the plaintiff might, for such cause, obtain a new execution, on *scire facias*.

CONTRACT brought to recover the balance due upon a judgment recovered in Connecticut for $360.45.

At the trial in the superior court, before *Morton*, J., the plaintiffs introduced in evidence a copy of the record of the judgment, and of the execution which issued thereon, with the officer's return, which showed that he had seized and sold personal property amounting, besides his fees, to the sum of $222.27; leaving the execution unsatisfied to the amount of $138.18. Among this property was a cow, which was sold for $21.50. The plaintiffs were allowed to prove, against the defendant's objection, that the defendant had brought a suit and recovered judgment against the officer for the taking of the cow; and the judge ruled that the plaintiff was entitled to recover the sum of $159.68, with interest, and a verdict was returned accordingly. The defendant alleged exceptions.

I. Sumner, for the defendant, cited *Wyer* v. *Andrews*, 13 Maine, 168; *Ladd* v. *Blunt*, 4 Mass. 402.

J. E. Field, for the plaintiffs, cited Gen. Sts. *c.* 133, § 18; *Canfield* v. *Miller*, 13 Gray, 274; *Gooch* v. *Atkins*, 14 Mass. 378; *Greene* v. *Hatch*, 12 Mass. 195; *Tate* v. *Anderson*, 9 Mass. 92.

METCALF, J. The court are of opinion that the plaintiffs can recover, in this action, only $138.18, the amount for which the execution that was issued on the judgment now in suit was returned unsatisfied, and interest thereon, and that the laws of this commonwealth afford them no means of recovering the other sum of $21.50, which they claim. It appears from the case of *Langdon* v. *Langdon*, 1 Root, 453, that by the law of

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Connecticut, where the judgment in suit was rendered, the plaintiffs might have a writ of *scire facias* thereon, and a new execution for said sum. See also *Stoyel* v. *Cady*, 4 Day, 222, and *Williams* v. *Cable*, 7 Conn. 119. So by our Gen. Sts. *c.* 133, § 18, "if an execution is returned satisfied in whole or in part by the sale of property not liable to such execution, and if damages are recovered against the judgment creditor, or the officer who served the execution, on account of the seizure and sale of the property, the creditor may have a writ of *scire facias* on his judgment, and shall thereupon be entitled to a new execution for the sum then remaining justly and equitably due to him." As the creditor, in such case, had no remedy at common law, *scire facias* is his only remedy. *Perry* v. *Perry*, 2 Gray, 326. *Andover & Medford Turnpike* v. *Gould*, 6 Mass. 44. But it is manifest that this remedy must be confined to our domestic judgments, and cannot be applied to the present case; for we cannot issue an execution on a judgment of a court of another state or country.

For these reasons, and because legal remedies must be conformed to the law of the forum where they are sought, and, when that law affords no remedy, that forum is powerless, the plaintiffs cannot have judgment for the full amount of their verdict, and these exceptions must be sustained, unless the plaintiffs shall remit $21.50 and the interest thereon, which are included in the verdict. On remitting that amount, they may take judgment for $138.18, and interest on that sum to the time when the verdict was returned. If the plaintiffs so elect, they may discontinue this suit, or become nonsuit, and resort to a court in Connecticut for the recovery of both the aforesaid sums.

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TIMOTHY JONES *vs.* CHARLES J. CARTER.

Arbitrators appointed under a rule of court to hear and determine a complaint for flowing land have power to award concerning costs, so far as such costs are authorized by law; and to include therein the costs of reference, but not an attorney's fee at the hearing before them.

If such arbitrators, after assessing damages in favor of the complainant, add to their award, "The complainant's cost of reference, as taxed and determined by the referees," with a statement of the items, this is a finding that the complainant is to recover his costs so taxed.

COMPLAINT for flowing land, which was referred under a rule of court to arbitrators, who made an award, assessing damages in favor of the complainant, and containing at the end, before their signatures, the following: "The complainant's cost of reference, as taxed and determined by the referees," with a statement of items, which included five dollars for attorney's fee, and sixty-one dollars and fifty cents for referees' fees and expenses. This bill of costs was allowed by the clerk of the superior court, and on appeal by the court; and the defendant appealed to this court.

M. Wilcox, for the defendant.

J. Dewey, Jr., for the complainant.

BIGELOW, C. J. The power of arbitrators, appointed under a rule of court, to award on the subject of costs is perfectly well settled in this commonwealth. *Nelson* v. *Andrews*, 2 Mass. 164. *Bacon* v. *Crandon*, 15 Pick. 79. This power is not interfered with or controlled by any statute provisions. Gen. Sts. *c.* 156, § 21. Nor can there be any doubt that it includes an authority to determine concerning the costs of arbitration as well as the costs of court. *Vose* v. *How*, 13 Met. 244. The fees of arbitrators and the expenses attending the hearing before them are the necessary costs of the cause, incurred by the consent of parties before the tribunal of their own selection, and are deemed to be included in the power given by the rule to determine the cause as incident thereto, and forming an essential part of the final determination thereof. But this power cannot be extended farther, so as to authorize an award of costs to either party for fees or items of charge not expressly authorized by law. No

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consent to such allowance can be implied from the reference of the cause. Beyond the award of their own fees and the necessary expenses of the reference, such as the charges for the place of meeting and the cost of stationery, arbitrators can include no costs in their award, except those which are expressly authorized by law to be taxed as legal costs. This would include the fees for attendance of witnesses before the arbitrators, and other similar charges.

On looking at the award in the present case, we cannot doubt that it was the intention of the arbitrators to award costs to the complainant, as taxed and made up by them. This is the only reasonable construction of that clause in the award which relates to the subject of costs. Indeed, it could have been inserted for no other purpose. But on looking at the items of costs "as taxed and determined" by the arbitrators, we notice that an attorney's fee of five dollars is allowed. We know of no warrant in law for any such charge before arbitrators. An attorney's fee on an issue of fact or law joined in the superior court is allowed by Gen. Sts. *c.* 156, § 27. But it is limited to two dollars and fifty cents. Certainly this provision gives no sanction to the item allowed in the present case, nor are we able to see any plausible ground on which it can be sustained. In this particular, the taxation allowed by the clerk is erroneous, and it must be corrected by striking out the item. When that is done, the order may be, *Taxation affirmed.*

Inhabitants of Washington *vs.* Philip Eames.

If the selectmen of a town who appoint an agent for the sale of intoxicating liquors, under St. 1855, c. 215, § 5, agree with him that the amount of his compensation shall depend upon the amount of sales, no action can be maintained against him by the town for a failure to account for the proceeds of the business, although he executed a bond as agent, in the form required by the statute.

Tort against a person who was appointed, and gave bond in the form required by the statute, as agent of the town of Washington for the sale of intoxicating liquors.

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After the former decision in this case, reported in 6 Allen, 417, the defendant had leave to file an answer; and at the trial in the superior court, before *Vose*, J., the jury returned a verdict for the plaintiffs, under instructions authorizing them to do so, upon facts which are sufficiently stated in the opinion. The defendant alleged exceptions.

J. D. Colt & T. P. Pingree, Jr., for the defendant, cited *St.* 1855, *c.* 215, §§ 1, 5; *King* v. *Green*, 6 Allen, 139; *Commonwealth* v. *Thorniley*, Ib. 446; *Way* v. *Foster*, 1 Allen, 408; *Mills* v. *Western Bank*, 10 Cush. 22; *Duffy* v. *Gorman*, Ib. 45; *Western Bank* v. *Mills*, 7 Cush. 539; *White* v. *Buss*, 3 Cush. 450.

S. W. Bowerman, for the plaintiffs.

Hoar, J. The defendant's agency for the plaintiffs was created by the appointment made by the selectmen, under *St.* 1855, *c.* 215, § 5. By that statute, the compensation of the agent of a town for the sale of intoxicating liquor is to be fixed by the selectmen who appoint him; and it is expressly provided that the amount of the compensation is not to depend upon the amount of sales. The selectmen who appointed the defendant, in direct violation of the statute, agreed with him that his compensation should depend on the amount of sales. They thus employed him by an illegal contract, and he proceeded to carry on, under this appointment, a traffic in other respects illegal. No action can be maintained by the town for a failure to account for the proceeds of such a business under such a contract. He would be responsible to the town only for their property received by him; and this, it seems, he has accounted for.

Exceptions sustained.

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Thomas Wood *vs.* Philo Melius.

An affidavit in an action of tort, made in behalf of the plaintiff therein, that the deponent believes and has reason to believe that the defendant "intends to leave the state, so that execution, if obtained, cannot be served upon him," is insufficient to authorize an arrest, under Gen. Sts. *c.* 124, § 2.

Tort. The writ was served by an arrest of the defendant, who moved for a dismissal of the action on the ground that the affidavit indorsed upon the writ was insufficient to authorize the arrest, under Gen. Sts. *c.* 124, § 2. The affidavit was as follows: "I, Henry J. Dunham, in behalf of the plaintiff named in the annexed writ, do on oath declare that the plaintiff has a good cause of action against the defendant therein named, and a reasonable expectation of recovering a sum equal at least to one third the damages claimed in the writ; and that I believe, and have reason to believe that he intends to leave the state, so that execution, if obtained, cannot be served upon him." The action was dismissed in the superior court, and the plaintiff appealed to this court.

J. E. Field, for the plaintiff.

J. Dewey, Jr., for the defendant.

Metcalf, J. It is provided by the Gen. Sts. *c.* 124, § 2, (reënacting § 1 of *c.* 249 of *St.* 1855,) that "no person shall be arrested on mesne process in an action of tort unless the plaintiff or some person in his behalf makes oath," among other things, "that he has reason to believe that the defendant is likely to remove beyond the jurisdiction of the court to which the writ is returnable." The oath in behalf of this plaintiff was, that the person who made it had reason to believe that the defendant intended to leave the state. This is not what the statute requires. A person may intend to do what there is no likelihood that he will do. And one person may safely swear that he has reason to believe that another intends to do an act which he has no reason to believe it is likely that the other will do. The judgment of the superior court is affirmed.

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Josiah C. Arnold *vs.* Henry Dresser.

In order to charge an indorser of a joint note, a demand must be made upon all the promisors by some one who has the note with him at the time, unless special circumstances are shown to excuse its absence.

Such demand is not waived by a promise by the indorser to pay the note, if at the time of making the promise he is erroneously informed by the holder that a due demand has been made upon the promisors.

Contract against the indorser of a joint promissory note.

At the trial in the superior court, before *Morton*, J., it appeared that on the day when the note became due, Theodore S. Stratton, in behalf of the plaintiff, demanded payment thereof of the two promisors, but did not have the note in his possession at the time; and the note was not paid. The plaintiff testified that on the same day he called upon the defendant, and gave notice to him that demand had been made on the makers; that one of the makers called during the interview, and both he and the defendant said that the note should be paid soon.

Upon this evidence, the judge ruled that the plaintiff was not entitled to recover, and directed a verdict for the defendant, which was accordingly rendered, and the plaintiff alleged exceptions.

H. W. Bishop, for the plaintiff.

J. E. Field, for the defendant.

Bigelow, C. J. The defendant is not liable as indorser of the note declared on. In order to charge him it was necessary for the plaintiff to show due presentment and demand of the note on both the promisors; *Union Bank of Weymouth, &c.* v. *Willis*, 8 Met. 504; or a waiver thereof by the defendant. There were no such presentment and demand. If a note is made payable at a particular place, the holder must have it at that place on the day of its maturity, in order to make due presentment; if it is not payable at a designated place, the note must be presented to the promisor at his usual place of business or at his dwelling-house. But no valid presentment and demand can be made by any person without having the note in his possession

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at the time, so that the maker may receive it in case he pays the amount due, unless special circumstances, such as the loss of the note or its destruction, are shown to excuse its absence. *Shaw* v. *Reed*, 12 Pick. 132. *Freeman* v. *Boynton*, 7 Mass. 483.

Nor was there any waiver of due demand by the defendant. No such waiver is made, where an indorser promises to pay the note in ignorance of the fact that he has been discharged by the laches of the holder, in not making due demand of the promisor, or where such promise is made under a misapprehension or mistake of facts concerning the due presentment and demand of the note. *Low* v. *Howard*, 11 Cush. 268. *Kelley* v. *Brown*, 5 Gray, 108. In the case at bar, the defendant made the statement on which the plaintiff relies to show a waiver, not only in ignorance of the fact that the note had not been duly demanded of one of the promisors, but under a mistaken belief that it had been so demanded, induced by the false statement to that effect made to him by the plaintiff. *Exceptions overruled.*

JOSEPH COUNTER *vs.* GEORGE B. COUCH.

In an action to recover damages for an injury sustained from a collision upon a highway, the plaintiff must prove that he was in the exercise of ordinary care at the time, although the defendant was travelling with a horse and sleigh, without having three bells attached to any part of the harness.

TORT to recover damages for an injury sustained from a collision upon a highway.

At the trial in the superior court, before *Morton*, J., it appeared that the plaintiff, a boy of less than twelve years old, was running in the road a short distance behind a horse and sleigh, which met and turned out for the defendant, who was coming from the opposite direction with a horse and sleigh, and very soon afterwards the defendant came into collision with the plaintiff. Two bells were attached to the defendant's harness, and two others to his sleigh. The plaintiff requested the court

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to instruct the jury that the defendant, not having three bells attached to any part of his harness, as required by Gen. Sts. *c.* 77, § 3, was illegally travelling upon the highway; that therefore the plaintiff need not prove that the defendant was not in the exercise of ordinary care, or that he himself was in the exercise of ordinary care; and that the plaintiff could recover for the injury sustained by him from the collision, unless he wilfully caused himself to be run over. The judge declined so to rule, and instructed the jury that the burden of proof was on the plaintiff to show that he was, and that the defendant was not, in the exercise of ordinary care and diligence; that the injury must have been caused solely by the negligence of the defendant; that the omission to have the requisite number of bells attached to the harness was negligence, and that, if the injury resulted therefrom, without fault on the part of the plaintiff, the defendant would be liable.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. E. Field, for the plaintiff.

M. Wilcox, for the defendant.

METCALF, J. There is no legal ground for the support of these exceptions. It is too plain and well established to require the citation of authorities, that the jury were correctly instructed that the burden of proof was on the plaintiff to show that he was in the exercise of ordinary care, that is, reasonable care, when he was injured, and that his injury was caused solely by the defendant's negligence. Even if the defendant, by neglecting to attach three bells to some part of his horse's harness, incurred a penalty of twenty dollars, under the Gen. Sts. *c.* 77, § 4, and thus rendered himself liable to the plaintiff for all dam ages sustained by him "by reason of such offence," he certainly did not, by that neglect, render himself liable for the injury inflicted on the plaintiff, unless that injury was caused solely by that neglect. *Kidder* v. *Dunstable*, 11 Gray, 342.

Exceptions overruled.

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JOHN E. INGERSOLL *vs.* STOCKBRIDGE AND PITTSFIELD RAILROAD COMPANY.
JAMES QUIGLEY *vs.* SAME.

Under the statutes of this commonwealth, a railroad company which has leased its railroad to another company, with stipulations that the whole transportation of passengers and freight upon the railroad shall be done by the lessees, is responsible in damages for buildings upon its route, which are destroyed by fire communicated by a locomotive engine owned and used upon the railroad by the latter company. And it is immaterial that one of the buildings was destroyed by the spreading of the fire from other buildings, and that, by consent of the railroad company, it stood partly within the location of the railroad.

HOAR, J. These actions are brought to recover compensation for property destroyed by fire communicated by the locomotive engines of the defendant corporation; and are founded upon the liability created by Gen. Sts. *c.* 63, § 101, which is as follows: "Every corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines; and shall have an insurable interest in the property upon its route, for which it may be so held responsible, and may procure insurance thereon in its own behalf."

The locomotive engine by which the fire was communicated was the property of the Housatonic Railroad Company, who were in possession of the railroad of the defendant corporation under a lease made in January 1850; by which it was stipulated that the whole transportation of passengers and freight upon the road should be done by the lessees. Whether this engine is to be deemed the locomotive engine of the defendants, within the meaning of the section above cited, is the principal question raised by the bill of exceptions; and we are all of opinion that it must be so regarded.

It is provided by law that "no locomotive engine or other motive power shall be allowed to run upon a railroad constructed by authority of this state, except such as is owned and controlled by the corporation owning and managing the road, unless with the consent of the corporation." Gen. Sts. *c.* 63, § 119. By §§ 115 and 116 of the same chapter, corporations

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whose roads connect with each other are empowered to contract that either shall perform all the transportation of persons and freight upon and over the road of the other, subject to the qualification that "where such contracts are made, the corporation owning the road shall be liable for all damage done or injury sustained thereon or in the use thereof in the same manner and to the same extent that it would be liable if it performed the transportation itself." These provisions, as they stand in the General Statutes, are clearly broad enough to include the case of injury caused by fire from locomotive engines. But it is argued for the defendants that the last two sections are substantially copied from an earlier statute, (*St.* 1838, *c.* 99,) passed before the statute which first created the absolute liability of railroad corporations for injuries caused by fire; (*St.* 1840, *c.* 85;) and that as a matter of construction, therefore, the legislature can not be held to have intended to include in them that species of liability.

The defendants' charter made them expressly subject, not only to all the general laws which had been, but to those which should afterward be passed, relative to railroad corporations. And in *Lyman* v. *Boston & Worcester Railroad*, 4 Cush. 288, it was held that *St.* 1840, *c.* 85, applies to railroads established before as well as since its passage. When a new liability is created by statute, or a new cause of action, resulting from damage done or injury sustained in the use of the road, arises from some new regulation which the legislature have authority to make, there is no reason why this liability or cause of action should not attend those which had existed previously, and devolve upon the corporation owning the road. The defendants had it in their power to indemnify themselves from all responsibilities, present and future, by the covenants in their lease; and the lease which is produced in the case shows that they have done so effectually.

The locomotive engine from which the fire originated was running upon the defendants' road, with their consent, in the transaction of the business for the accommodation of which their franchise was conferred. If it was run without the

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precautions necessary to make it safe to the property of others, we can see no reason why the corporation owning and having the profit of the franchise should not be held primarily responsible, as in other cases of injury to persons and property. It is within the spirit and intent, as well as the letter, of the law.

The case of Quigley differs from that of Ingersoll only in one particular, which is not material. The fire communicated directly from the locomotive to Ingersoll's barn, and spread through an intervening shed, which stood partly upon the railroad location, to the barn of Quigley. *Hart* v. *Western Railroad*, 13 Met. 99. There is nothing in this statement to show that any fault of the plaintiff contributed to the loss, if the buildings were lawfully placed where they stood. The fact that a building or other property stands near a railroad, or partly or wholly on it, if placed there with the consent of the company, does not diminish their responsibility, in case it is injured by fire communicated from their locomotives. The legislature have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause. *Exceptions overruled.*

J. D. Colt, (*T. P. Pingree, Jr.*, with him,) for the defendants, cited *Ross* v. *Boston & Worcester Railroad*, 6 Allen, 87; *Martin* v. *Simpson*, Ib. 102; *Lyman* v. *Boston & Worcester Railroad*, 4 Cush. 288; *Hart* v. *Western Railroad*, 13 Met. 99; *Veazie* v. *Penobscot Railroad*, 49 Maine, 119.

M. Wilcox, for the plaintiffs, cited *Langley* v. *Boston & Maine Railroad*, 10 Gray, 103; *Clement* v. *Canfield*, 28 Verm. 302; *Nelson* v. *Vermont & Canada Railroad*, 26 Verm. 717; *York, &c. Railway* v. *Winans*, 17 How. (U. S.) 30; *Beman* v. *Rufford*, 1 Sim. (N. S.) 550.

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Henry W. Snow *vs.* Housatonic Railroad Company.

A railroad company may be held liable for an injury to one of its servants, which is caused by a want of repair in the road-bed of the railroad.

If it is the duty of a servant of a railroad company to uncouple the cars of a train, and this cannot easily be done while the train is still, and he, in endeavoring to uncouple them while the train is in motion, steps between the cars and meets with an injury which is caused by a want of repair of the road-bed of the railroad, the court cannot rule as matter of law that he was careless, but should submit the question to be determined by the jury; although he continued in the employment of the company after he knew of the defect.

Tort to recover damages for an injury sustained by the plaintiff in consequence of a want of repair of the road-bed of the defendants' railroad.

At the trial in the superior court, before *Vose*, J., it appeared that the injury was received at a place in West Stockbridge where the railroad of the defendants crossed a highway, and near an intersection with the Hudson and Boston Railroad. The Western Railroad Company, as contended by the plaintiff, had a right under certain contracts to use the defendants' tracks and switches at this place, for the passing of their cars and engines, and for making up freight trains and distributing freight cars from the trains upon the different tracks uniting there. The plaintiff was employed by the Western Railroad Company to attend to the switches upon the defendants' railroad at this place, and to make up and distribute the freight trains for the Western Railroad. A plan was put into the case, exhibiting the position and distances of the various points referred to. At the place where the defendants' railroad crossed the highway, three lengths of plank had been laid down between the rails, and up to within about two inches of them, entirely across the highway; and one of these planks had become defective, and there was a hole in it, large enough to admit a man's foot. This hole had existed for more than two months, and the plaintiff had known of it for that length of time, and had complained of it to the repairer of the tracks of the defendants' railroad.

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The plaintiff testified, amongst other things, that he was forty-seven years of age; that he had been employed upon railroads in various capacities for twenty-three years; that at the time of the injury he was engaged in distributing a freight train; that for the purpose of giving an impetus which should send the cars to the place where he wished them to be, he gave a signal to the engineer to back his engine; that the engineer did so, setting the cars in motion at a very slow rate; that while they were so in motion he stepped between the engine and the car next to it, at a short distance from the place where the hole in the plank was, for the purpose of uncoupling the cars, by taking out the pin by which it was connected with the engine; that while in that position, endeavoring to get out the pin, the train continued in motion, and he had to take two or three steps with it; that as he pulled out the pin, and was stepping away, his foot was caught in the hole in the plank, and he could not get it out before the wheel of the tender ran over his leg, and so injured it that amputation became necessary; that the hole was partly filled by a knot, upon which he stepped, and which went down, and, as he pulled up his foot, the knot caught it, and he could not get it out; that after making the signal for the engineer to back his engine he made no signal for him to stop; that he thought he should have time to get out the pin and get away before he got to the crossing; that he did not get away before he got to the plank because he had not time, but he did not recollect whether the pin stuck; that he did not think anything about the hole at that time; that the mode of uncoupling trains which was adopted by him was a prudent one; that there was no other mode of uncoupling them; that at this point it was an ascending grade, and the engine had to ease back, and that he could not have pulled out the pin if the cars had been still, unless the engine eased back; and that it would have taken some little time to stop the cars by the brake, and then ease up by backing the engine, and take out the pin.

There was also other evidence as to the speed of the train, and the safety of the plaintiff's method of uncoupling the cars.

The judge ruled that upon this evidence the plaintiff could

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not recover, and a verdict was accordingly returned for the defendants. The plaintiff alleged exceptions.

H. W. Bishop, for the plaintiff, cited, in addition to cases cited in the opinion, *King* v. *Boston & Worcester Railroad*, 9 Cush. 112; *Hayes* v. *Western Railroad*, 3 Cush. 270; *Keegan* v. *Western Railroad*, 4 Selden, 175; *Norris* v. *Litchfield*, 35 N H. 271; *Park* v. *O'Brien*, 23 Conn. 339; *Beers* v. *Housatonic Railroad*, 19 Conn. 566.

J. D. Colt, (*T. P. Pingree, Jr.*, with him,) for the defendants. The case of the plaintiff disclosed such want of care on his part as to defeat his action. [See cases cited in the opinion, 448.] Under the arrangement between the railroad companies, the plaintiff and the person whose duty it was to repair this crossing were to all intents fellow-servants. The road was in joint occupation; so that, when the Western Railroad Company sent their servants down there, they sent them on their own road. *Farwell* v. *Boston & Worcester Railroad*, 4 Met. 49. At all events, the risk was one which the plaintiff assumed by continuing his employment after notice of the defect.

Bigelow, C. J. There can be no doubt of the liability of the defendants to respond in damages to a party injured by reason of a defect in the highway caused by their misfeasance or nonfeasance. Every one who creates an obstruction to travel, by erecting barriers, making excavations or otherwise, in a public way, is guilty of causing a nuisance, and if special damages are thereby occasioned an action will lie against him. The remedy which the statute gives for such injuries against towns is only cumulative or additional to that which the party injured has at common law against the person by whose agency the obstruction or defect was caused or permitted to continue. 2 Chit. Pl. (6th Amer. ed.) 599. *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24, 33.

We think it equally clear that the defendants are not relieved of this liability to the plaintiff by reason of any relation which subsisted between him and them at the time of the accident, arising out of the employment in which he was engaged. In the first place, on the facts reported in the exceptions, it does not appear

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that he was employed in any duty or service for or in behalf of the defendants. On the contrary, it is stated that he was in the employment of another corporation. The only connection shown to exist between the parties to this suit is, that the corporation by which the plaintiff was employed had a right to use a portion of the tracks of the railroad belonging to the defendants for certain specific purposes, by virtue of a contract, the precise terms of which are not declared, and that the plaintiff, when the accident happened, was actually engaged in using one of these tracks in making up freight trains, which was one of the objects for which the defendants allowed their road to be used under the contract referred to. On these facts, it is difficult to see how the doctrine applicable to a claim for damages occasioned by the carelessness of a fellow-servant, against a common employer, can have any bearing on the rights of the parties to this action. The case is not unlike that put by way of illustration in *Farwell* v. *Boston & Worcester Railroad*, 4 Met. 49, 61, of a railroad owned by one set of proprietors, whose duty it was to keep it in repair, and used by another set of proprietors with engines and cars, paying toll to the owners of the road. In such case, the intimation of the court is very strong that a servant in the employment of the last named proprietors would have an action against the former for an injury caused by the negligence of one of their servants.

But, in the next place, a decisive answer to this ground of defence is, that it does not appear that the defect in the road, which was the proximate cause of the accident, was the result of any such negligence of a servant of the defendants, that they would be excused from liability. It was caused by a want of repair in the superstructure or road-bed between the tracks of the defendants' road, where it crossed the highway. In other words, the defendants neglected to keep a portion of their road, where it was necessary for the plaintiff to go in the discharge of his duties, in a suitable and safe condition, so that he could not pass over it without incurring the risk of injury. Now while it is true, on the one hand, that a workman or servant, on entering into an employment, by implication agrees that he will undertake

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the ordinary risks incident to the service in which he is to be engaged, among which is the negligence of other servants employed in similar services by the same master, it is also true, on the other hand, that the employer or master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and will also take due precaution to adopt and use such machinery, apparatus, tools, appliances and means as are suitable and proper for the prosecution of the business in which his servants are engaged, with a reasonable degree of safety to life and security against injury. Thus an owner of a steamboat would be liable to an engineer or workman in his employment for an injury occasioned by the use of a boiler which was clearly defective and insufficient. So a manufacturer would be subjected to a like liability by the use of imperfect or badly constructed machinery. And in like manner the proprietors of a railroad would be responsible for accidents happening by tracks improperly laid, or switches which were not constructed to operate with regularity and precision. The distinction on which this rule of law is founded is an eminently wise and just one. It is this: A workman or servant, on entering upon any employment, is supposed to know and to assume the risks naturally incident thereto; if he is to work in conjunction with others, he must know that the carelessness or negligence of one of his fellow-servants may be productive of injury to himself; and besides this, what is more material, as affecting his right to look to his employer for damages for such injuries, he knows or ought to know that no amount of care or diligence by his master or employer can by possibility prevent the want of due care and caution in his fellow-servants, although they may have been reasonably fit for the service in which they are engaged. It is certainly most just and reasonable that consequences which the servant or workman must have foreseen on entering into an employment, and which due care on the part of the employer or master could in no way prevent, should not be visited on the latter. But it is otherwise where injuries to servants or workmen happen by reason of improper and defective machinery and

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appliances used in the prosecution of a work. The use of these they could not foresee. The legal implication is, that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and oversight; and if he fails to do so, he is guilty of a breach of duty under his contract, for the consequences of which he ought in justice and sound reason to be responsible. Such we understand to be the rule of law, and the principles on which it is founded, as now fully established by authority. *Seaver* v. *Boston & Maine Railroad*, 14 Gray, 466. *Cayzer* v. *Taylor*, 10 Gray, 274, 282, and cases cited in note.

The case at bar, if the plaintiff could be justly regarded as in the employment of the defendants, clearly falls within that branch of the rule under which the employer is held responsible for injuries caused by the use of improper or defective means for the proper performance of the work or duty to be rendered by those engaged in his service. The place where the accident happened was intended to be used for the purpose of making up trains. It was necessary for the person whose duty it was to unshackle the cars, or to fasten them together, to pass and repass over the space covered with plank between the tracks frequently and with rapidity, and with his attention in great degree diverted from the surface over which he passed, and directed to the special duty or service of separating and uniting the cars, in order to prepare the trains for transit. The existence of such a defect as the evidence disclosed at the trial, being of a nature to obstruct the plaintiff in passing safely and rapidly over and between the tracks, and to hinder him in the performance of the service in which he was engaged, tended very strongly to show that the defendants had committed a breach of the implied obligation which rested upon them to provide a suitable place in which the plaintiff could perform his duty safely, in the exercise of due and reasonable care, and without incurring a risk which did not come within the scope of his employment. The omission of the defendants was analogous to a failure on their part to have and maintain safe and suitable tracks, switches or turnouts, or to construct and keep in repair stanch and sufficient

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bridges. For such failure or omission they would be clearly liable in damages to a person in their employment who might be injured thereby, according to the principles and authorities already referred to. As the case stood, therefore, at the trial, there was evidence offered by the plaintiff which tended very strongly to show that the defendants had been guilty of negligence and a breach of duty, which would render them liable to the plaintiff in this action.

It is urged by the counsel for the defendants that the omission to repair the defect which occasioned the injury was the result of the negligence of the person whose duty it was to see that the planks across the highway were kept in a safe and proper condition, and that the accident was therefore caused by the carelessness of a fellow-servant. But this argument leaves out of sight the real ground on which the liability of the defendants rests. If the argument is well founded, then it would follow that, as a corporation can act only by agents or servants, it would escape all responsibility for every species of injury caused by defective machinery and apparatus, or badly constructed tracks, or insufficient bridges and other similar causes. So an individual could avail himself of a similar immunity, if he conducted his business exclusively by agents or servants. But the rule of law does not lead to any such absurd result. The liability of the master or employer in such cases is founded, as has been already said, on the implied obligation of his contract with those whom he employs in his service. This requires him to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and renders him liable for damages occasioned by a neglect or omission to fulfil this obligation, whether it arises from his own want of care, or that of his agents to whom he intrusts the duty. But it does not extend so far as to require of him that he should be responsible for the negligence of his servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient.

The only remaining question is, whether there was anything

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in the acts or conduct of the plaintiff, at the time he received the alleged injury, which showed a want of due care on his part, sufficient to defeat his right to recover damages, and to warrant the court in withholding the case from the consideration of the jury. We think it very clear that there was not. There is a class of cases involving the question of the exercise of proper care on the part of a plaintiff, in which it is not only the right but the duty of the court to decide as a matter of law that the plaintiff has failed to maintain his action, and to direct a verdict for the defendant. These are cases where, upon the uncontradicted evidence, it appears that the plaintiff was guilty of a want of due care, and thus fails in proving an essential legal element in his case. In such an aspect of the evidence, it is the duty of the court to pronounce on its legal effect. It is certainly difficult if not impossible to lay down any general rule which shall be of easy application to every case which may arise. It may be said generally, however, that where the admitted or uncontroverted facts of a case show that the acts and conduct of a plaintiff, at the time of an alleged injury, and contributing to produce it, are such as to indicate, according to the common experience and observation of mankind, a want of due and reasonable care, adapted to the circumstances in which he is placed, he does not show any legal cause of action, and it is the duty of the court in such a state of the proof to direct a verdict for the defendant. Of this character are all the cases heretofore decided in this court, where such course has been pursued. In *Lucas* v. *New Bedford & Taunton Railroad*, 6 Gray, 64, the plaintiff was injured while attempting to leave a train after the locomotive had begun to move it. A similar state of facts was proved in *Gavett* v. *Manchester & Lawrence Railroad*, 16 Gray, . In *Todd* v. *Old Colony & Fall River Railroad Co.* 3 Allen, 18; S. C. 7 Allen, 207, a passenger was injured in consequence of having protruded his arm outside of the window of the car while the train was in rapid motion. In *Gahagan* v. *Boston & Lowell Railroad Co.* 1 Allen, 187, a traveller on the highway undertook to pass between cars in motion, propelled by an engine, having no sufficient reason for making so hazardous an attempt. In

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all these cases the conduct of the plaintiffs was inconsistent with that degree of common care and prudence which men ordinarily adopt when placed in similar circumstances.

But the case at bar falls within a different category. The plaintiff, when the accident occurred, was in the performance of a duty or service which required him to step between the cars and the engine of a train, for the purpose of uncoupling them by drawing the bolt which held them together. This, it appears, could not be done when the train was standing entirely still, but it was necessary for the engine to move so as to loosen the bolt sufficiently to enable him to withdraw it from its socket, and he was engaged in performing that service in the usual and ordinary mode, when he was thrown down by reason of the defect in the road. A case of this sort is not within common observation and experience, and cannot be judged of by the ordinary rule or standard applicable to persons who are only passengers or travellers, and who are engaged in no special or particular service. If, for example, a passenger should meet with an injury in attempting to pass from one car to another while the train was going at a high rate of speed, his act would be deemed by every one an imprudent one, and so manifestly wanting in proper care that he could not recover damages from the railroad company, although some negligence or want of due care on their part might have contributed to the injury. But if a conductor of a train, whose duty it is to pass from one car to another, should while doing so meet with a similar accident from a similar cause, it could not be properly said that he was guilty of negligence in passing from car to car while the train was in motion. That he was required to do by the nature of the service in which he was engaged; and the question of negligence would depend on other considerations, growing out of the peculiar circumstances of the case. So, in the case at bar, if the plaintiff had been a traveller or bystander, and without any sufficient reason or excuse had gone between the car and engine when they were in motion, and had there received an injury, it would be too clear to admit of question, that the consequences of any accident which happened to him would fall

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exclusively upon himself. But as the plaintiff was in the discharge of his duty in placing himself in a perilous position — a duty the performance of which was known to and sanctioned by the defendants — the fact that he was in such position has no tendency to prove that he was negligent or careless. The question of due care in such case depends on the manner in which the plaintiff performed the duty incumbent on him whether he acted with due skill and caution, and conducted himself in the usual and ordinary way in which similar acts are done by persons engaged in like employment; and on other considerations of a like character, which do not fall within the range of ordinary observation and experience. The question of negligence was therefore a proper subject of evidence, and should have been submitted with proper instructions to the jury for their determination.

Nor do we think that it was any the less a question of fact to be decided by the jury, because it appeared that the plaintiff had previous knowledge of the defect in the road which caused the accident. *Reed* v. *Northfield*, 13 Pick. 98. *Smith* v. *Lowell*, 6 Allen, 40. This certainly was a circumstance to be taken into consideration, but by no means a decisive one. If the service to be performed by the plaintiff was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect, or be prepared at all times to avoid it.

It may be suggested that the plaintiff ought not to recover, because he continued in the performance of his duties after he was aware of the existence of the defect in the road. There may be cases where a servant would be wanting in due care by incurring the risk of injury in the use of defective or imperfect machinery or apparatus, after he knew it might cause him bodily harm. But we do not think this case is one of that class. His continuance in the employment did not necessarily and inevitably expose him to danger.

On the whole case, as presented to us, we are of opinion that the verdict for the defendants should be set aside, and a

New trial granted.

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EDWARD NARY *vs.* WILLIAM G. MERRILL & another.

If the validity of a mortgage made by an insolvent debtor upon his homestead to secure a preëxisting debt, within six months previous to the commencement of proceedings in insolvency, is questioned on the ground that it was not made in the usual and ordinary course of his business, and the evidence simply shows that he was a millwright, and had no other occupation or business, the jury should be instructed that the mortgage was not made in the usual and ordinary course of his business.

WRIT OF ENTRY to foreclose a mortgage given by one Gardner, one of the defendants, to the plaintiff.

At the trial in the superior court, before *Rockwell*, J., a verdict was found for the plaintiff, and the judge signed a bill of exceptions showing the following facts: The defendant Merrill is the assignee in insolvency of the defendant Gardner, and the mortgage was executed within six months before the commencement of the proceedings in insolvency, to secure a preëxisting debt. Gardner was a millwright, and had no other occupation or business, and was and for many years had been the owner of the mortgaged premises as a homestead. Merrill contended that the mortgage was in contravention of Gen. Sts. *c.* 118, §§ 89, 91, and therefore void, and requested the court to instruct the jury that if Gardner, being insolvent, and having no business except as a millwright, made the mortgage to secure a preëxisting debt, such mortgage would not be in the usual and ordinary course of his business, and so would be *prima facie* evidence of a reasonable cause of belief by the plaintiff that Gardner was insolvent or in contemplation of insolvency. The judge declined so to rule, and instructed the jury that, if they should find "that Gardner made the conveyance with a view to prevent the property from going into the hands of the assignee, and that the plaintiff had reasonable cause to believe that Gardner was insolvent or in contemplation of insolvency, and if the mortgage was not made in the usual and ordinary course of Gardner's business, they might consider that fact as *prima facie* evidence of such cause of belief."

The defendants alleged exceptions.

M. Wilcox, (*J. E. Field* with him,) for the defendants.

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H. W. Bishop & B. Palmer, for the plaintiff.

Hoar, J. When a mortgage is made by a person actually insolvent or in contemplation of insolvency, to secure a pre-existing debt, within six months previous to the commencement of proceedings in insolvency by or against him, it may be avoided by his assignee in insolvency, if the mortgagee had reasonable cause to believe him insolvent at the time he took the mortgage, and that the conveyance was made to impede the operation of the insolvent laws; and it is made *prima facie* evidence of such cause of belief, if the conveyance "is not made in the usual and ordinary course of business of the debtor." Gen. Sts. *c.* 118, § 91.

The question at the trial upon which the point presented by the bill of exceptions arises was, whether the mortgage under which the plaintiff claims was made "in the usual and ordinary course of business of the debtor." It appeared that the insolvent debtor was a millwright, and had no other occupation or business, and for many years had been the owner of the mortgaged premises as a homestead. The defendant asked the court to instruct the jury as matter of law that upon these facts the conveyance would not be in the usual and ordinary course of business of the debtor; but the presiding judge refused to give the instruction asked, and instructed them simply in the language of the statute.

There can be no doubt that the instruction given was correct, so far as it went. And it is not certain that the instruction asked, considered as a general and abstract proposition, can be maintained. We cannot say as an absolute rule of law that a millwright may not so carry on his business, that making mortgages of his real estate shall be "in the usual and ordinary course" of it. He might, in the usual course of business, make contracts for the erection of mills, which would require the use of more capital than he had, and which would oblige him to obtain materials on credit, or to borrow money to purchase them. He might often find that the returns from his business were not received so soon as to enable him to meet his payments; and that an extension of his credits would involve the necessity of

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giving security. This very mortgage might have been given as security for an ordinary business obligation, and he might have made a similar one for a similar purpose a dozen times before. If such were the facts, the making of this mortgage could not have been regarded as furnishing any reasonable cause of belief of his insolvency to the mortgage creditor.

But, on the contrary, if no such state of facts was shown to exist; indeed, if no other facts appeared in evidence than those which the bill of exceptions discloses, it is obvious that a mortgage of his homestead to secure a preëxistent debt would not be in the usual and ordinary course of business of the debtor; and the jury should have been so instructed. The question is not whether such transactions are usual in the general conduct of business throughout the community, but whether they are according to the usual course of business of the particular person whose conveyance is the subject of investigation. If it is a departure from his usual and ordinary course of business, the statute intends that the party taking the conveyance from him shall be put upon inquiry. The difficulty which presents itself arises from the meagre report of the evidence at the trial which is given in the bill of exceptions. If it is fairly to be inferred from that report that these were all the facts appearing, and that upon these facts the presiding judge refused to give the instructions asked, and left the whole matter to the jury, without any explanation as to what would be meant by the language of the statute, we should think that a new trial ought to be granted; not because the instructions were erroneous, but because they were insufficient, and not such as the posture of the case required. The instructions asked, if not in terms a perfect and complete enunciation of the rule of law, would have been practically the result of the case presented to the jury. If they had been given in the very terms of the defendant's prayer, and he had obtained a verdict, they would not, as applied to the facts disclosed, have been so substantially incorrect as to make it necessary to set it aside.

And we are inclined to think that such is the just inference to be drawn from the statements in the bill of exceptions.

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Nothing else appears; and although the defendant did not incorporate in his prayer for instructions the negative statement that there was no other evidence before the jury, it might be fairly implied. *Exceptions sustained.*

HORACE GOODRICH & another *vs.* ALLEN S. YALE.

If the declaration in an action contains but one count, setting forth various trespasses upon real estate, accompanied by particular acts of injury, a judgment therein for a portion of such acts is a bar to a subsequent action to recover damages for others of the same acts.

TORT. The declaration, after setting forth the plaintiffs' title, alleged, in one count, that on divers days and times between the 9th of October 1857 and the 17th of December 1860 the defendant wrongfully closed the gate of the plaintiffs, at their reservoir dam in Stockbridge, and shut back the water from the plaintiffs' mill. Writ dated October 9th 1863. The defence was, a former recovery for the same cause of action.

At the trial in the superior court, before *Morton*, J., it appeared that on the 2d of January 1863 the plaintiffs sued out a writ against the defendant and William Whitney, upon a bond signed by them, dated October 24th 1849, the condition of which recited that "whereas said Yale has hitherto been guilty of various acts of trespass and malicious mischief to the mill, machinery, dam and other property of said Goodrichs in Stockbridge," and provided that "if the said Yale shall from this time henceforth and forever wholly and absolutely abstain from all trespasses, injuries, mischiefs and annoyances to the property of said Goodrichs," "and all other unlawful acts whatsoever which shall in any wise tend to molest, disturb or injure the said Goodrichs in the enjoyment of their property," then the bond should be void.

The declaration in the action upon this bond contained one count, which alleged, among other things, that Yale, at divers

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times between the day of executing the bond and the commencement of the action, entered upon the plaintiffs' real estate without right and raised the gate of their dam, and caused the water to flow down and waste their reservoir and at times flood their mill, and then, by shutting the gate, took away the water from their mill, and by his acts of trespass rendered the mill valueless.

At June term 1863 the court passed the following order: "Ordered by the court that Henry W. Taft and Edward H. Owen be appointed assessors in the above entitled case; and they are to notify, meet and hear the parties, assess the damages occasioned to the plaintiffs by the raising of the gate in the reservoir dam, and make report thereof to the court." The assessors, after a hearing, reported "that the damages sustained by the plaintiffs in this case amount to the sum of one hundred and twenty-five dollars." Judgment was entered upon this report.

Upon these facts, the judge ruled that the present action was barred by the former judgment; and a verdict was accordingly returned for the defendant. The plaintiffs alleged exceptions.

J. E. Field, for the plaintiffs, cited *Trask* v. *Hartford & New Haven Railroad*, 2 Allen, 331, and cases there cited; *Sawyer* v. *Woodbury*, 7 Gray, 499; *McDowell* v. *Langdon*, 3 Gray, 513; *Gilbert* v. *Thompson*, 9 Cush. 348; *White* v. *Moseley*, 8 Pick. 356; *Jones* v. *Fales*, 4 Mass. 255; *Bridge* v. *Austin*, Ib. 117.

H. W. Bishop, (*M. Wilcox* with him,) for the defendant.

Dewey, J. In what cases a former judgment in a suit between the same parties shall operate as a bar to further litigation by a new action, is a question of much nicety. The difficulty arises not so much for want of certain general rules upon the subject, as from the doubt as to which class of cases the one which is the subject of inquiry belongs.

A suit and judgment thereon for the same cause of action are said to be absolutely conclusive, as a bar to a second action But it is equally true that the mere fact that the plaintiff has in his former action declared for the same causes of action does

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not necessarily present a case where the judgment in such action shall be a bar to a subsequent suit, for one of the causes set forth in the former. Thus in *Seddon* v. *Tutop*, 6 T. R. 607, where the plaintiff in the former action had in different counts declared on a promissory note and for goods sold, and, the defendant being defaulted, the plaintiff, upon executing his writ of inquiry, gave no evidence on the count for goods sold, and took his damages for the promissory note only, it was held that the judgment was no bar to his recovering in a subsequent action for the goods sold. But in that case there were two distinct demands set forth in distinct counts, and not in the least blended together. It is also true, as held in the case of *White* v. *Moseley*, 8 Pick. 356, that when there are distinct torts, committed consecutively, but on different localities, and the plaintiff institutes his action for one only, such former suit and judgment thereon, although the action might properly have embraced both the torts, yet constitutes no bar to a second action for the other act. On the other hand, the case of *Trask* v. *Hartford & New Haven Railroad*, 2 Allen, 331, strongly asserts and applies the principle that a judgment in a civil suit upon a certain alleged cause of action is conclusive upon the parties in relation to it, and that another suit for the same cause cannot be maintained for any purpose whatever. In that case the subjects of damages in the different actions were wholly distinct, the one being the loss of a shop, and the second the loss of a dwelling-house. No damages had been claimed or recovered in the first action for the loss of the house, but the loss of each was caused by the same tortious act, and one recovery for any part of the damages caused by such act was held a bar to a second action. It was said by the court in that case: "It would be unjust, as well as in violation of the fixed rule of law, to allow the plaintiff to subject the defendants to the hazard and expense of another suit to obtain an advantage which he lost either by his own carelessness and neglect, or by an intentional withholding of a part of his proof."

We have stated these authorities, selected from the very numerous cases that have been decided, that we might have

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some landmarks to guide us in the application of the rules of law to the present case. The inquiry is, under which, if either of these classes does the present case fall? It certainly differs from the case of *Seddon* v. *Tutop*, 6 T. R. 607, in the fact that there the causes of action were on the face of them distinct and independent, and were sought to be enforced as such by separate counts. That case only shows that a party may omit to assess his damages on one of several distinct counts for acknowledged distinct causes of action, and, if he does so, a judgment for damages upon the other causes of action will not bar a second suit for the causes of action for which no damages were assessed.

The doctrine of this case is not entirely free from objection, inasmuch as it allows a party unnecessarily to subject the other party to a second suit, after the plaintiff has elected to unite two causes of action in one suit, and when he has had full opportunity to obtain judgment for his entire damages. The case before us differs from *White* v. *Moseley*, 8 Pick. 356, in the fact that there the particular tort, the subject of the second action, was not embraced in the declaration, or set forth as the cause of complaint in the first action. It differs also in the fact that there the torts were committed on different localities, the one on the premises of the plaintiff and the other not. That case came before the court under very peculiar circumstances. The plaintiff had, in the trial of his former suit, insisted upon his right to recover damages for the cause of action set up in the second suit; but, the defendant opposing it upon the ground that the alleged trespass *quare clausum* did not embrace the close where the second injury was done, the court ruled that evidence to support this claim of the plaintiff was not admissible, it being a distinct cause of action. 5 Pick. 230. In the trial of the second action, the ruling maintaining it was based entirely upon the assumption that the acts of the defendant were separate torts, and therefore constituted more than one cause of action. The inquiry therefore will be, whether the present case, differing as it does from *Seddon* v. *Tutop*, in having only a single count, charging combinedly a tort by raising

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and then shutting down the gate of the plaintiffs, instead of two distinct counts for separate causes of action, comes within the principle there decided. The like inquiry will also arise as to the effect of the difference in the circumstances we have alluded to in the case of *White* v. *Moseley*, in distinguishing that case from this.

If this shall be taken to have been but one cause of action although damages might properly have been assessed for various distinct acts, then the case we have cited of *Trask* v. *Hartford & New Haven Railroad*, which is abundantly sustained by other authorities, would be decisive upon the point that the former judgment is a bar to this action.

The case is barren of all evidence as to the nature of the grievance complained of, except as shown by the record of the proceedings in the two actions. We turn, therefore, to the declaration in the first action. We find there that the tort complained of was, that on divers days the defendant entered upon the real estate of the plaintiffs without right, and raised the gates of their dam and caused the water to flow down and waste their reservoir, and at times to flood their mill, and then, by shutting the gate, took away the water from their mill. Here the acts causing the damages are stated as a series of connected acts, occurring while the defendant was a trespasser, by entering without right upon the real estate of the plaintiffs, and the answers of the defendant so treated the same, denying the allegation that he had entered upon the plaintiffs' real estate without right, and denying all the acts alleged as wrongs connected with the trespass.

Upon the issues thus joined, that case, as appeared by the copy of the record, was referred to the assessors, "to assess the damages occasioned to the plaintiffs by the raising of the gate in the reservoir dam, and make report thereof to the court." They did subsequently report that the damages sustained by the plaintiffs in this case amounted to the sum of $125, and judgment was thereupon entered for that sum. It is now said that this judgment is not a bar to the present action, because the court did not submit to the assessors this specific ground of

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damage, and did not direct them to assess damages for shutting down the plaintiffs' gate. This is true; but it is equally true that they did not direct the assessors to assess damages for causing the water to flow down and waste their reservoir, and at times flood their mill, all of which were alleged as injuries. The order seems to have first declared a reference of the case. Then follows an imperfect description of the alleged causes of damages.

There is no apparent reason for naming one portion of the case rather than another as the subject for the assessment of damages. It was certainly not a full recital of the plaintiffs' alleged grievances. But if it were to be taken that the assessors only reported upon one of the alleged acts, it is quite clear that it was open to the plaintiffs to ask for a recommittal for that cause, and under an enlarged rule. But the plaintiffs were content to take these damages as the damages for the entire trespasses that were set forth in their declaration.

But however this may be, we are of opinion that the judgment in the former action must be a bar to the present one, inasmuch as the cause of action, as presented by the plaintiffs on the record, is one and the same. The grievance complained of was an illegal entry upon the plaintiffs' land, and by various acts, enumerated in the declaration, rendering their mill valueless. The particular acts causing the damage to the mill are not set forth, as connected with a separate entry, but as a series of acts, all of which are combined as causing the injury to the mill. It is true that the declaration does not restrict them to the proof of a single entry, but it does connect all these acts with each and every entry. It fails to state them as separate causes of action, or to allege them to have occurred at different times.

Finding the acts complained of in the present action to be embraced in the former declaration, and treated as one cause of action, and no reason appearing why they should not be so considered, the judgment in the former case would be equally a bar to the present action, whether the plaintiffs recovered damages in that action for all the acts connected with it or not.

Exceptions overruled.

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Seth Barlow *vs.* Congregational Society in Lee.

A note in this form: "$23.00. Lee, April 26, 1858. On demand, I, as treasurer of the Congregational Society, or my successors in office, promise to pay A. B. or order twenty-three dollars, value received, with interest. S. S. R., Treasurer," is the note of the society, if the treasurer had authority to bind them by it.

Contract brought by the administrator of the estate of Reuben Barlow against the Congregational Society in Lee, upon the following promissory note:

"$23.00. Lee, April 26, 1858. On demand, I, as treasurer of the Congregational Society, or my successors in office, promise to pay Erastus Hall or order twenty-three dollars, value received, with interest. Samuel S. Rogers, Treasurer."

The declaration alleged that the defendants, for value received by them, made the note by Samuel S. Rogers, their treasurer and agent, duly authorized; and that it was duly indorsed to the plaintiff's intestate. The defendants filed a general demurrer, which was overruled in the superior court, and judgment rendered for the plaintiff; and the defendants appealed to this court.

M. Wilcox, for the defendants.

J. Branning, for the plaintiff.

Gray, J. It is well settled in this commonwealth that the question whether a principal or his agent is the party liable upon a negotiable note or bill of exchange must be ascertained from the instrument itself, at least when both are in law capable of contracting and it is not pretended that either has adopted the name of the other as his own for the purpose of transacting business. This exception to the general rule which governs other parol (or unsealed) agreements is derived from the nature of negotiable paper, which, being made for the very purpose of being transferred from hand to hand, and of giving to every successive holder as strong a claim upon the maker as the original payee had, must indicate on its face who the maker is; for any additional liability of the principal, not expressed in the form of such a note or bill, would not be negotiable; and any ambiguity,

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arising upon the face of the writing, in determining whether it is the promise of the principal or of the agent, must, on the ordinary principles of the law of evidence, be solved without the aid of extrinsic testimony. *Bank of British North America* v. *Hooper*, 5 Gray, 570, 571, and cases cited. *Williams* v. *Robbins*, 16 Gray, . *Draper* v. *Massachusetts Steam Heating Co.* 5 Allen, 339. *Slawson* v. *Loring*, Ib. 342.

The plaintiff has mainly relied upon the case of *Mann* v. *Chandler*, 9 Mass. 335, in which it was held that promissory notes expressed to be made by "I, the subscriber, treasurer of the Dorchester Turnpike Corporation," and signed "Gardner L. Chandler, Treasurer of Dorchester Turnpike Corporation," were the notes of the corporation, and not of the treasurer. That case, although it has never been in terms overruled, has never been followed in this commonwealth, can hardly be reconciled with the later decisions, and must be maintained, if at all, upon the ground that the treasurer of a corporation is by virtue of his office the hand by which the corporation conducts all its pecuniary affairs, signs all its commercial paper, and pays all its debts. *Eastern Railroad* v. *Benedict*, 5 Gray, 565. *Fiske* v. *Eldridge*, 12 Gray, . *Draper* v. *Massachusetts Steam Heating Co.* 5 Allen, 339.

In that view, the notes of the treasurer of a corporation would be assimilated to those of the cashier of a bank, which the American courts, in accordance with mercantile usage, have often shown the strongest inclination to treat as contracts of the bank. *Mechanics' Bank of Alexandria* v. *Bank of Columbia*, 5 Wheat. 335, 336. *Hartford Bank* v. *Barry*, 17 Mass. 94. *Folger* v. *Chase*, 18 Pick. 63. *Bank of Utica* v. *Magher*, 18 Johns. 346. *Watervliet Bank* v. *White*, 1 Denio, 613. *Farmers & Mechanics' Bank of Michigan* v. *Troy City Bank*, 1 Doug. (Mich.) 470, 472, 473. It has indeed been adjudged by the supreme court of the United States, as well as by this court, that on commercial paper payable to "A. B., cashier," the bank, although not named in the instrument, might maintain an action. *Barney* v. *Newcomb*, 9 Cush. 53. *Baldwin* v. *Bank of Newbury*, 1 Wallace, 234. Whether those decisions stand upon the peculiar relation

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between a bank and its cashier, or (as the opinions imply) upon a general right of any principal to sue upon negotiable paper made to his agent, we need not here inquire. See *West Boylston Manuf. Co.* v. *Searle*, 15 Pick. 230; *Commercial Bank* v. *French*, 21 Pick. 486; *Fuller* v. *Hooper*, 3 Gray, 341; *Eastern Railroad* v. *Benedict*, 5 Gray, 563, 564, and cases cited; *Williams* v. *Robbins*, 16 Gray, , *Bank of United States* v. *Lyman*, 20 Verm. 673–677, and cases cited; S. C. 12 How. (U. S.) 243.

But a draft payable to "A. B., Treasurer of the Hampshire Manufacturing Company," has been held to be well indorsed by the signature of "A. B., Treasurer;" Chief Justice Shaw saying, "This mode of naming the payee, for aught that appears on the draft, was a *descriptio personæ*." *Shaw* v. *Stone*, 1 Cush. 253, 254. Still more directly opposed to the case of *Mann* v. *Chandler* is that of *Seaver* v. *Coburn*, 10 Cush. 324, in which it was held that a lease to Nathan P. Coburn, "Treasurer of the Eagle Lodge No. 114, I. O. O. F.," and signed "N. P. Coburn, Treas." bound Coburn personally. The files of that case show that the lease was under seal, and it is common learning that a sealed instrument takes effect more according to its form, in proportion to the apparent intention, than a simple contract; but it does not appear by the report or opinion that any stress was laid upon that distinction, or upon its not being shown that an Odd Fellows' Lodge was a corporation capable of contracting.

All the decisions of this court upon unsealed instruments since the case of *Mann* v. *Chandler* have required something more than a mere description of the general relation between the agent and the principal, in order to make them the contracts of the latter. Thus an agreement which declares the signers to be a committee of a certain town, or trustees of a particular meeting-house, and is signed with their own names, without addition, is their individual contract. *Simonds* v. *Heard*, 23 Pick. 120. *Packard* v. *Nye*, 2 Met. 47. And see *Crew* v. *Petit*, 3 Nev. & Man. 450; S. C. *nom. Rew* v. *Pettet*, 1 Ad. & El. 196. So a promissory note, in the body of which the principal is not named, and which is signed by the agent in his own name, does

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not, by the mere addition to his signature of the words "trustee" or "president" of a particular railroad corporation, become the note of the corporation. *Fiske* v. *Eldridge*, 12 Gray, . *Haverhill Ins. Co.* v. *Newhall*, 1 Allen, 130. To the same effect are *Fogg* v. *Virgin*, 19 Maine, 352; *Hills* v. *Bannister*, 8 Cow. 31; *Barker* v. *Mechanics' Ins. Co.* 3 Wend. 98; *Moss* v. *Livingston*, 4 Comst. 208. We are therefore unwilling to rest our judgment in this case upon the authority of *Mann* v. *Chandler*.

Nor can our decision be governed by the case, next cited by the plaintiff, of *Dawes* v. *Jackson*, 9 Mass. 490, in which an indenture made by the defendant, "as superintendent or agent of the Massachusetts State Prison," he having authority by virtue of his office to bind the Commonwealth in the matter of that contract, was held not to bind him personally; for that case may have been decided upon the ground that the defendant was a public agent. *Hodgson* v. *Dexter*, 1 Cranch, 345. *Parks* v. *Ross*, 11 How. (U. S.) 374.

Upon the question what words in a simple contract, made by the hand of an agent of an individual or private corporation, will bind the principal, the line of distinction between the cases, even in the same court, is very narrow. Thus it is well settled that a promissory note made by an agent, without naming his principal in the body of it, but signed "For C. D., A. B.," or "A. B., agent for C. D.," or "A. B., for C. D." is the note of C. D., the principal. *Long* v. *Colburn*, 11 Mass. 97. *Emerson* v. *Providence Hat Manuf. Co.* 12 Mass. 237. *Ballou* v. *Talbot*, 16 Mass. 461. *Rice* v. *Gove*, 22 Pick. 158. *Paige* v. *Stone*, 10 Met. 160. *Ex parte Buckley*, 14 M. & W. 469. But it seems to be equally well settled in this court, and supported by English authority, that the mere insertion of "for," or "for and in behalf of" the principal, in the body of the note, does not make it the contract of the principal, if signed by the mere name of the agent, without addition. *Bradlee* v. *Boston Glass Manufactory*, 16 Pick. 347. *Morell* v. *Codding*, 4 Allen, 403. *Penkivil* v. *Connell*, 5 Exch. 381. *Tanner* v. *Christian*, 4 El. & Bl. 591. So a direction in a bill of exchange drawn by an agent to place the amount "to the account" of his principal,

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has been held not to exempt an agent, signing his own name without addition; *Mayhew* v. *Prince*, 11 Mass. 54, and papers on file in Suffolk, March term 1814; but to bind the principal, when the word "agent" was added to the signature. *Tripp* v. *Swanzey Manuf. Co.* 13 Pick. 292, 293. *Fuller* v. *Hooper*, 3 Gray, 334.

Even the insertion in a promissory note of the word "as" between the name of the signer and the description of his relation to another person, has been held not sufficient to exempt him from personal liability, where the note showed upon its face that no other person was legally bound; as in the case of a promissory note made by a guardian "as guardian," and repeating the word "guardian" after his signature, when he had no authority in law to bind the person or estate of his ward by such a note. *Thacher* v. *Dinsmore*, 5 Mass. 299. *Forster* v. *Fuller*, 6 Mass. 58. On like considerations it has been held in England that a promise to pay money made by solicitors "as solicitors," bound them and not their client. *Burrell* v. *Jones*, 3 B. & Ald. 47. See also *Eaton* v. *Bell*, 5 B. & Ald. 34.

But wherever it appears upon the face of a simple contract made by the agent of one named therein, and whom he can legally bind thereby, that he acts as agent and intends to bind his principal, the law will give effect to the intention, in whatever form expressed. Thus it seems to be well settled in England that an authorized agent making a written agreement "by procuration of" his principal, binds his principal only. Lord Ellenborough, in *Leadbitter* v. *Farrow*, 5 M. & S. 345. Wightman and Crompton, JJ., in *Mare* v. *Charles*, 5 El. & Bl. 980. So this court, in what has long since become a leading case, held that an agreement written upon the back of a negotiable promissory note in these words: "By authority from J. De Wolf, Jr., I hereby guaranty the payment of this note. Isaac Clap," was the contract of De Wolf. *New England Marine Ins. Co.* v. *De Wolf*, 8 Pick. 56. And an agreement in which "the undersigned, committee for the First School District," promise in behalf of said district to pay a certain sum for building a school-house therein, signed by the individual members of

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the committee, with the word "committee" opposite all their names, has been held by the supreme court of Maine not to make them personally liable. *Andrews* v. *Estes*, 2 Fairf. 267. See also *Abbey* v. *Chase*, 6 Cush. 56; *Tripp* v. *Swanzey Manuf. Co.*, and *Fuller* v. *Hooper*, above cited; *Bank of Australasia* v. *Breillat*, 6 Moore P. C. 161, 189; *Lewis* v. *Nicholson*, 18 Q. B. 503; *Green* v. *Kopke*, 18 C. B. 549.

The case now before the court is stronger against the principal than any of these. The note is dated at Lee, and calls the person who affixes the signature "treasurer of the Congregational Society," thus distinctly naming the Congregational Society in Lee, and showing who the principal is; the promise contained in the note is expressed to be made by the writer "as treasurer of" that society; it does not promise a payment by the present treasurer at all events, but by him "or his successors in office," which could not be if the note were merely his personal act, and not the act of the corporation whose agent he was; and the designation of his office is repeated after his signature. In short, the note not only names the principal, describes the relation between the principal and the agent, and declares the note to be made in execution of the agency, but it cannot take effect according to its terms, except as the note of the principal.

As the intention to bind the defendants thus appears upon the face of the note, and it is alleged in the declaration and admitted by the demurrer that the agent had authority to bind them, the judgment must be *Demurrer overruled.*

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Russell Kilborn & another *vs.* Loring G. Robbins.

One who takes a deed of warranty of land, which is duly recorded, and afterwards takes an assignment of a prior mortgage upon the same and another lot, may enforce the mortgage for its full amount upon such other lot, against the mortgagor or his subsequent grantee. And the fact that such grantee has become the assignee of a subsequent mortgage upon such other lot is immaterial.

Proof of a purchase of land, with full covenants of warranty, for less than its value, is no proof that the purchaser undertook to discharge a mortgage thereon, of the existence of which he does not appear to have had actual notice.

If a purchaser of land, with full covenants of warranty, afterwards takes an assignment of a prior mortgage upon the same and another lot, and the mortgagor afterwards conveys the other lot to one who takes possession thereof, and the assignee of the mortgage afterwards demands of such grantee the payment of the full amount of the face of the debt secured thereby, and payment is refused, and the assignee of the mortgage afterwards fails to comply with a request for an account of the money due upon his mortgage, and of the rents and profits of the mortgaged premises, and of the moneys paid for taxes, repairs and improvements thereon, and various other particulars relating to the same, and also omits for several years to renew the demand for payment of his mortgage debt, he is not thereby estopped to enforce his mortgage against such grantee, or one who has taken a title under him with notice of all the facts.

If a deed of land contains an express stipulation that the grantee shall assume and pay a debt secured by a mortgage existing thereon, a payment of such debt in pursuance of such stipulation, and a discharge of the mortgagor therefrom, will operate as a discharge of the mortgage.

A second mortgagee of land may maintain an action to foreclose his mortgage against one who holds the first mortgage and also the equity of redemption.

If a suit to foreclose a mortgage has been instituted, this court will not by injunction restrain the prosecution of it, although the holder of the equity of redemption offers in his bill to redeem.

Bill in equity praying for an injunction to restrain the defendant from prosecuting in the superior court two actions brought by him, one against Russell Kilborn, and the other against the other plaintiff, Mark Kilborn, for the purpose of foreclosing a mortgage, and, by an amendment, offering to redeem by paying such sum as might be necessary therefor.

After the former decision, overruling the demurrer to the bill, (4 Allen, 369,) the case was referred to a master, from whose report the following facts appeared:

Robert Kilborn, the former owner of the premises demanded by the defendant under the mortgage hereinafter described, mortgaged the same, with certain other land, to Jeremiah Atwood, on the 9th of April 1845, to secure the sum of $1260

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and on the 13th of March 1849 conveyed the same, by deed of warranty, to Joel Kilborn, who on the same day mortgaged the same to Robert Kilborn, to secure the payment of an annuity of $167.70. On the same day Robert Kilborn conveyed the other land included in the Atwood mortgage, together with certain other real estate, to Russell Kilborn, who on the same day mortgaged the same to Robert Kilborn, to secure the payment of an annuity of $167.70, during his life, and, on the 22d of April 1851, Robert Kilborn executed to Russell Kilborn a release of said premises, the deed containing the following provision: "The premises are subject to a mortgage deed given by me to Jeremiah Atwood, for the sum of $1260, which he the said Russell Kilborn assumes and is to pay;" and also a release of all his interest in the premises mortgaged to him by Joel Kilborn, as above described. The language of this release, so far as material, is copied in the opinion. The sum due to Atwood was accordingly paid on the 9th of April 1863, and the following statement was written upon the mortgage: "I, Jeremiah Atwood, the mortgagee named in this mortgage deed, given by Robert Kilborn, hereby acknowledge payment and satisfaction for the same, and therefrom discharge said Kilborn, his heirs and his assigns forever. J. Atwood and seal." On the 5th of June 1849, Joel Kilborn executed to Charles N. Emerson a mortgage, recorded June 7th 1849, of the premises conveyed to him by Robert Kilborn, consisting of fifty-four acres and thirty-three rods of land, and also another lot of land called the Leavenworth Grove lot, to secure the payment of a note of $313, and interest. On the 12th of June 1849, Joel Kilborn conveyed the Leavenworth Grove lot to the defendant by a deed of warranty, with full covenants against incumbrances, which was recorded on the following day. On the 30th of November 1850, Emerson assigned his mortgage to the defendant, and the assignment was recorded on the same day. On the 2d of April 1850, Joel Kilborn executed to Mark Rossiter a mortgage of the lot of fifty-four acres and thirty-three rods, and Rossiter, after taking possession for breach of condition, assigned his mortgage to Russell Kilborn in August 1851. In June 1851

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Joel Kilborn released his interest in the last mentioned lot to Russell Kilborn. In 1856 Russell Kilborn conveyed a portion of said lot to Mark Kilborn by deed of warranty.

The consideration named in the deed of Joel Kilborn to the defendant, of the Leavenworth Grove lot, was $1350; its value was then $1150; and the consideration paid was certain shares of stock, worth $900. The value of the lot of fifty-four acres and thirty-three rods in 1849 was $2700. Both lots have since much increased in value.

After purchasing the Emerson mortgage the defendant made two or three applications to Russell Kilborn for payment of the debt secured by it, and on one occasion exhibited to him the note, and claimed that the whole amount of it was due. Afterwards, on the 27th of August 1852, Russell Kilborn caused a notice to be served upon the defendant, requesting an account of the money due upon his mortgage, and of the rents and profits of the mortgaged premises, and of the moneys paid for taxes, repairs and improvements thereon, and various other particulars relating to the same. The defendant did not reply to this notice in writing, nor make any of the returns or statements called for therein; except again exhibiting the note and claiming that the whole of it was due, just prior to bringing his actions to foreclose the mortgage.

The defendant has been in possession of the Leavenworth Grove lot since his purchase of it in 1849; and the plaintiffs have been in possession of the lot of fifty-four acres and thirty-three rods, since June 1851. At the time of the conveyance by Russell Kilborn to Mark Kilborn in 1856, the latter knew the above facts respecting the title of the last named lot. Robert Kilborn died in 1857, and it did not appear that the condition of the mortgage to him was ever broken.

Upon these facts, the case was reserved for the determination of the whole court.

I. Sumner, for the plaintiffs. Russell Kilborn has a right to hold the premises against the defendant, as equitable assignee of the mortgage to Atwood, which he paid. *Hunt* v. *Hunt*, 14 Pick. 374. *Freeman* v. *McGaw*, 15 Pick. 82. *Barker* v. *Parker*.

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4 Pick. 505. *Gibson* v. *Crehore*, 3 Pick. 475; S. C 5 Pick. 146. Also as assignee of the mortgage of Joel Kilborn to Robert Kilborn. The fact that the defendant paid only $900 for the Leavenworth Grove lot, and afterwards refused to render an account when requested, goes to show that he was to pay the Emerson mortgage; and his conduct should estop him to enforce it. If, however, that mortgage can still be enforced, the Leavenworth Grove lot should contribute. 1 Washburn on Real Prop. 568, and cases cited. *Lyman* v. *Little*, 15 Verm. 576. *James* v. *Morey*, 2 Cow. 246. If Emerson still held his mortgage, Russell Kilborn, as holder of the Rossiter mortgage, could compel him to satisfy it upon the Leavenworth Grove lot; and the defendant can stand in no better position than Emerson could. In any event, the difference between the value of the Leavenworth Grove lot and the amount paid for it by the defendant, should be applied upon the Emerson mortgage.

M. Wilcox, for the defendant.

Dewey, J. The plaintiffs have filed their bill in equity asking this court to restrain the defendant from further prosecuting two actions in the superior court against the plaintiffs severally, as occupants of distinct parcels of land, to foreclose a mortgage made by Joel Kilborn to Charles N. Emerson, bearing date June 5, 1849, to secure the payment of a note of $313, which mortgage and note were assigned by Emerson to the defendant on the 30th of November 1850. They allege in their bill that nothing is due upon said mortgage, or, if anything is due thereupon, that they should be charged with only a part thereof, alleging that the defendant is the owner of certain other premises that should be charged *pro rata* with payment of such sum. They also claim to be the lawful owners of certain prior mortgages, one made by Robert Kilborn to Jeremiah Atwood, and another made by said Joel Kilborn to Robert Kilborn. They also in their amended bill offer to pay whatever sums, if any, the court shall find to be justly due to the defendant as assignee of the said Emerson mortgage, which is properly chargeable on the lands they occupy.

The first inquiry is, whether the allegation of the plaintiffs as

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to payment of the sum secured by the mortgage to Emerson has been sustained by the proof. Upon this point the plaintiffs have, in the opinion of the court, failed to maintain their allegation. Nor are any such facts shown as are requisite to sustain the defence of an equitable estoppel against the defendant's enforcement of his mortgage.

Assuming this to be so, the plaintiffs then insist that the entire premises described in the mortgage of Joel Kilborn to Emerson should be charged with the payment of the debt secured by that mortgage. Upon this point, it appears that the mortgage included not only the premises demanded of the plaintiffs in the suits against them, but also another parcel of land called the Leavenworth Grove lot. But this lot, after having been thus mortgaged to Emerson, was sold and conveyed by deed of warranty by the mortgagor to the defendant. The effect of this sale by the mortgagor of a portion of the mortgaged premises was to exempt the land thus sold from any contribution towards payment of the mortgage, as against Joel Kilborn, the mortgagor, and those claiming by subsequent conveyances from him. Such subsequent grantees would acquire no greater rights than the grantor had. As between the defendant and Joel Kilborn, and the subsequent grantee of Kilborn, the Emerson mortgage was after this sale chargeable on the fifty-four acre lot, and the owner thereof had no right to recur to the Leavenworth Grove lot for contribution. *Bradley* v. *George*, 2 Allen, 392. *George* v. *Kent*, 7 Allen, 16. *Welch* v. *Beers*, *ante*, 151.

The subsequent purchase of the Emerson mortgage by the defendant did not affect his right to have the Leavenworth Grove lot relieved from contribution towards the payment of it, such discharge from contribution having been fully effected at the moment of the conveyance with warranty by Joel Kilborn, the mortgagor.

No difficulty arises in the present case as to the Atwood mortgage, which was of a prior date to the Emerson mortgage. That mortgage is wholly discharged. It was paid by Russell Kilborn, who had taken a quitclaim deed of certain lands from

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Robert Kilborn, the mortgagor, bearing date April 22, 1851, in which it was stipulated that the debt secured by this mortgage should be paid by said Russell Kilborn. The cases of *Wedge* v. *Moore*, 6 Cush. 8, *Bolton* v. *Ballard*, 13 Mass. 227, and *Brown* v. *Lapham*, 3 Cush. 551, seem to be decisive in requiring us to hold this to be a payment. The principle stated in these cases is to the effect that where the money is paid by one who has assumed the duty of paying the debts, by contract with the mortgagor, or those succeeding to his rights, this must be taken, as regards other subsequent interests, as a payment; and this must certainly be true when the party takes no assignment, but contents himself with a naked acknowledgment of payment and discharge of the mortgage indorsed thereon.

The defendant's rights are in no way affected by the mortgage of Joel Kilborn to Rossiter, that mortgage having been made subsequently to the Emerson mortgage, and also to the conveyance by Joel Kilborn to the defendant.

Nor do we see any ground for the position taken by the plaintiffs that it should be required by this court that the Emerson mortgage should be satisfied wholly out of the Leavenworth Grove lot, because the subsequent mortgage to Rossiter only embraced the other land. The mortgage to Rossiter was made subsequently to the time when the Leavenworth Grove lot was exempted from contribution by the sale with warranty to the defendant. On account of this subsequent title, those who hold interests under that mortgage cannot set up any claim in reference to the Leavenworth Grove lot, or subject it to contribution, either directly or indirectly; much less charge the entire payment of the Emerson mortgage upon it, to the prejudice of the purchaser of the same from Joel Kilborn before the Rossiter mortgage existed.

The claim of the plaintiffs, that they have succeeded to the interest of Robert Kilborn, as mortgagee of the interest of Joel Kilborn, presents a question of more difficulty. This mortgage was dated March 13, 1849, and is therefore earlier in time than the Emerson mortgage, and covers the fifty-four acres demanded by the defendant in his actions pending in the superior court.

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On the 22d of April 1851, said Robert, in consideration of one dollar, remised, released and forever quitclaimed unto said Russell, his heirs and assigns forever, "all my right, title and interest in and to the following real estate, all and singular the same premises conveyed to me by the said Russell by his mortgage deed to me, dated March 13, 1849." "Also all and singular the same premises described in a certain mortgage deed given me by Joel Kilborn, dated March 13, 1849."

The cases of *Hunt* v. *Hunt*, 14 Pick. 374, and *Barker* v. *Parker*, 4 Pick. 505, seem to support the position that this conveyance by Robert Kilborn to Russell Kilborn would pass the interest of Robert Kilborn as mortgagee in the mortgage made to him by Joel Kilborn. This would certainly be so, unless the surrounding facts, and the circumstances connected with the conveyance to Russell, should make it appear that this mortgage was to be treated as cancelled.

But assuming that this conveyance to Russell Kilborn was sufficient to pass to him the mortgage in question, then Russell Kilborn would be the owner of a mortgage prior in date to the Emerson mortgage. If he did thus become the holder of this mortgage, his rights as such assignee of the mortgage would not be defeated by his having become the owner of the equity of redemption of the premises. There has been no evidence introduced to show any breach of the condition of this mortgage. The case is barren of all evidence upon this point. If such prior mortgage exists, and there has been any breach of the condition, the defendant, as second mortgagee, can acquire the actual possession of the premises only by redeeming the same and paying such sum as may be justly due thereon. But the existence of such prior mortgage does not operate to defeat the actions by the defendant to foreclose his mortgage, Russell Kilborn holding the equity of redemption of the second mortgage, as well as the alleged title of assignee of the first mortgage. *Cronin* v. *Hazletine*, 3 Allen, 324. The judgment for the defendant as such mortgagee would be a qualified one, as to disturbing the possession of any one having a prior mortgage, but valid and effectual to foreclose the second mortgage as against

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all titles subsequent to it. We do not perceive any necessity for maintaining this bill for the protection of the interest of Russell Kilborn, as assignee of the mortgage to Robert Kilborn.

The suits instituted by the defendant to foreclose his mortgage having been first instituted, this court will not sustain this bill and stay the proceedings in those suits, although the plaintiffs in their amended bill offer to pay all such sums as may be chargeable upon the lands held by them. The amount justly due upon the Emerson mortgage may be settled in those suits, and the payment of that sum will relieve the premises from all further charges thereon by reason of such mortgage.

Bill dismissed.

JOHN T. HOLLENBECK *vs.* JAMES H. ROWLEY.

If there is no competent record evidence of the laying out of a highway, and it appears that surveyors have been unable to ascertain the boundaries accurately, evidence of the existence of a fence substantially in the same place for more than twenty years, upon the side of the highway, is competent for the purpose of fixing the boundary line.

Ordinarily a deed of land bounded by a highway conveys the land, subject to the easement of the public, to the centre of the highway.

The rejection of a photographic view of premises, the boundaries of which are in dispute, and upon which a trespass is alleged to have been committed by placing rocks and rubbish thereon, furnishes no ground of exception, if the same is offered simply as a "chalk representation," without being verified by the oath of the photographer, although the evidence of other persons is offered to show its correctness.

A private individual may be held liable as a trespasser by the owner of land over which there is a public highway, for acts done to the injury of the latter in widening or repairing the highway, outside of the travelled part thereof; although a highway surveyor might properly have done the same acts.

In an action to recover damages for a trespass, evidence of a license from the plaintiff to do the acts complained of is not admissible, unless specially set up in the answer.

TORT to recover damages for a trespass to the plaintiff's land within the limits of a highway known as the Plain road in Egremont, by putting rocks and rubbish thereon.

At the trial in the superior court, before *Rockwell*, J., it became necessary for the plaintiff to prove the boundary line of

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the highway in question, upon the northerly side of which his land was situated. For this purpose he offered certain record evidence of the action of the county commissioners respecting the same, which, upon the objection of the defendant, was excluded. He then offered to show that the distance between the fences was about five rods, and that a certain fence was the north boundary of the highway, and had stood in its present position for more than twenty years before the commencement of the action. The defendant objected to this evidence, unless it was first shown that from length of time or otherwise the boundaries of the highway could not be made certain by records or monuments; but the evidence was admitted. A witness afterwards testified that surveyors had been out four times to ascertain the boundaries of the highway, and that no two of their surveys were alike.

There was other evidence tending to show that within twenty years a portion of the fence had been moved to the south; but this was contradicted. The judge ruled that if the fence was shown to have been, for more than twenty years, substantially in the same place and line, it was competent testimony to show the north line of the highway.

The plaintiff derived his title under two deeds, in one of which the land was described as bounded "south by the highway known as the Plain road," and in the other as "south on the Plain road, so called." The judge instructed the jury that under these deeds the land was bounded by the centre or thread of the highway.

The defendant offered a photographic view of the premises in controversy, without the testimony of the photographer who took it; but he offered to prove its correctness by persons well acquainted with the premises. The photograph was offered to be used as a "chalk representation" of the premises. The plaintiff objected, especially on the ground that it exhibited but part of the premises; and it was excluded.

There was evidence tending to show that some stones and rubbish were placed upon the north side of the travelled part of the highway, and thus widened and improved the road, and

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rendered it more safe and convenient for travellers; and the defendant asked the court to rule that he was not liable in this action if he did no more than a highway surveyor might reasonably have done in the ordinary discharge of his duties. The judge declined so to rule, and instructed the jury that if trespasses were committed north of the travelled part of the highway, and upon the plaintiff's land, they were not justifiable, although they effected a beneficial widening of the road; but that the defendant was not liable for such acts done within the travelled part, to repair it.

The defendant offered evidence tending to prove a license from the plaintiff to do the acts complained of; but, as no such ground of defence was set up in the answer, the judge excluded the evidence.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

H. W. Bishop & J. E. Field, for the defendant.

I. Sumner & M. Wilcox, for the plaintiff.

Dewey, J. 1. The ruling of the presiding judge, permitting the plaintiff to prove the existence of a certain fence on the northern side of the highway for more than twenty years, for the purpose of establishing the northern boundary of the highway, furnishes no legal ground for disturbing the verdict. There was in the case sufficient evidence to show that this boundary could not be made certain by record or by monuments. That a portion of the evidence upon this point was introduced after the evidence as to the fence was admitted, is not now material. The facts being in the case, the evidence as to the fence was properly before the jury. Gen. Sts. *c.* 46, § 1.

2. The court properly instructed the jury that the legal effect of the deeds introduced by the plaintiff was to show that the land thereby conveyed to him extended to the centre of the highway.

3. The rejection of the photographic view of the premises is not a ground for exception. It was not verified by the oath of the photographer, and was only offered as a "chalk representation" of the premises. As such, it was in the discretion of

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the presiding judge, in view of its imperfection, or want of fulness of description, as well as of its immateriality in reference to the understanding of the case on trial, to admit or reject it.

4. The court properly declined to instruct the jury that the defendant was not liable in this action for the alleged trespass, if he did no more than a highway surveyor might reasonably have done in the ordinary discharge of the duties of his office; and properly instructed them that if the trespasses were committed north of the travelled path in use, and upon the plaintiff's land, they were not justifiable, although they might have effected a beneficial widening of the road.

It was undoubtedly competent for the defendant, or any other person having occasion to use the public road, to remove all rails, bars, rocks, or other obstructions placed on the same, preventing the free and convenient use of the road. Gen. Sts. *c.* 46, § 4.

But entering upon land without the travelled road, and by excavations or embankments widening the road, to the prejudice of the adjacent owner, or in disturbance of his soil, is an unauthorized act. Gen. Sts. *c.* 44, vest in the surveyors of highways the authority for making all necessary repairs on public highways; and individuals, unauthorized by such surveyors or other lawful authority, cannot lawfully enter upon the land of an adjacent owner situated without the limits of the worked road, and take and remove earth; nor can they interfere with the same by placing rocks, stones and rubbish upon his land without the limits of the worked and travelled way.

The plaintiff having been shown to be the owner of the soil where these trespasses were committed, subject to the easement of the highway, this action may well be maintained against the defendant for the acts complained of. This principle seems fully sustained by adjudicated cases in this commonwealth and elsewhere. *Perley* v. *Chandler*, 6 Mass. 454. *Stackpole* v. *Healy*, 16 Mass. 33. *Peck* v. *Smith*, 1 Conn. 133. *Reed* v. *Leads*, 19 Conn. 187. *Cortelyou* v. *Van Brundt*, 2 Johns. 357. *Jackson* v. *Hathaway*, 15 Johns. 447.

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5. The defence of a license from the plaintiff to the defendant to do the acts now complained of as trespasses was not set up in the answer of the defendant; and, that objection having been taken by the plaintiff at the trial, the court properly excluded all the evidence offered upon that point.

Upon the whole case, the court see no ground for sustaining the exceptions. *Exceptions overruled.*

EDWARD L. DAY *vs.* INHABITANTS OF OTIS.

Selectmen of a town have no authority to bind the town by an offer of a reward for the apprehension and conviction of a person who has not been charged with a crime by a complaint or indictment.

CONTRACT upon an offer of a reward of $500, made on the 15th of September 1862, in the name of the defendants, by their selectmen, "for the apprehension and conviction of the person or persons who murdered Emily L. Jones, George A. Jones and Sarah E. Jones," at a time named.

It was agreed that on the 1st of October 1862 the plaintiff caused a complaint to be made before a magistrate against James Callender, for the murder of the persons named, who was thereupon arrested, and was afterwards tried, convicted and hung for the murder of Emily L. Jones; and that all three of the persons named were murdered at the same time, either by Callender alone, or by him with others. Certain other facts were agreed to, respecting the participation of the plaintiff in the proceedings, which are now immaterial.

Judgment was ordered in the superior court for the plaintiff, and the defendants appealed to this court.

H. W. Bishop, (*G. J. Tucker* with him,) for the defendants.

M. Wilcox, for the plaintiff.

BIGELOW, C. J. The defendants cannot be held liable in this action, unless the selectmen were authorized by law to make an offer of reward like that set out in the plaintiff's declaration.

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and thereby to bind the defendants. It is clear that such authority is not included within the ordinary powers and duties of selectmen of towns. If it exists at all, it must be by force of some special statute, which expressly confers it. The only enactment on the subject is to be found in Gen. Sts. *c.* 170, § 7. It is therefore on the construction of this provision that the decision of the present case depends.

The language of the statute is clear and explicit. It gives to selectmen authority to offer a suitable reward, to be paid by the town "to any person who in consequence of such offer secures any person charged with a capital crime or other high crime or misdemeanor committed in such place." Construing this clause according to the natural import of the words used, as well as with reference to the connection in which it stands with other provisions, and the obvious purpose which the statute was intended to accomplish, we think it embraces only cases where there has been a charge of crime duly made by a complaint before a magistrate or indictment by the grand jury, and the person so charged eludes arrest, so that he cannot be apprehended on a warrant by the use of ordinary vigilance and care. Such is the import of the phrase "charged with crime," as it is usually used and understood. It means something more than suspected or accused of crime by popular opinion or rumor, and implies that the offence has been alleged against a party according to the forms of law. Such is the sense in which it is manifestly used in other provisions of the statutes of this commonwealth. For example, in the same chapter of the General Statutes in which the section already cited is contained, § 9, judges of courts and justices of the peace are authorized to issue warrants for the apprehension of persons "charged with offences." So in § 11 of the same chapter, an officer to whom a warrant is issued is authorized to pursue into any county and apprehend the party "charged"; and in the following section it is provided that in certain cases a person against whom an offence is "charged in a warrant" may be admitted to bail. Many other instances of a like use of the word or phrase might be cited, in all of which the issue of legal process is clearly implied. That it was not intended to have a

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different meaning in the section under consideration is clearly indicated by the fact that the offer of reward therein authorized is in terms confined to those who may "secure" the person "charged" with offences. This manifestly implies that it was intended to apply only in cases where legal process had been previously issued, by which a person might be lawfully arrested. And in this connection it is material to notice that the provision is applicable not only to felons who may be arrested without warrant, but also to those who have been guilty of misdemeanors, for whose arrest a warrant is necessary.

This view of the true interpretation of this provision is greatly aided by the language of the section immediately preceding it, which authorizes the governor of the Commonwealth to offer rewards in certain cases. His authority is expressly limited to the offer of rewards to those who may apprehend, bring back and secure "any person convicted of or charged with" certain offences, who has escaped from prison in the state, or who may apprehend and secure a person charged with such offences, when he cannot be arrested and secured in the common course of proceeding. These provisions clearly apply only to cases where persons have been duly charged on legal process, and have escaped from actual custody thereon, or have avoided arrest. No others could escape from prison or elude arrest in the usual course of proceeding. Not only is it reasonable to infer that similar words and phrases are used in a like sense in enactments relating to the same subject matter and standing in immediate connection with each other, but it would be unreasonable to suppose that it was the intention of the legislature to vest in the selectmen a more extensive authority in relation to the arrest of offenders for crimes committed within the limits of their respective towns than was conferred on the governor over the same subject matter, with reference to criminals within the limits of the Commonwealth.

Looking only at the policy of these provisions of the statutes, it seems to us to be a reasonable and just limitation on the power of public officers to offer rewards for the apprehension of offenders, that it should be confined to cases where there has

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been a charge of crime made against a person in due form of law. A bounty offered for the detection of criminals, or the apprehension of persons on suspicion only, might lead to unwarrantable arrests, and be used by evil disposed persons for unjust purposes. Certainly it could serve no useful purpose to offer rewards for the apprehension of persons who were not eluding arrest, and who could be secured, by the use of ordinary means, to answer for any offences which might be charged against them.

This view of the interpretation of the statute is decisive against the right of the plaintiff to recover in this action. The offer of reward set out in the declaration was not such as the selectmen of the town had authority to issue; nor did the plaintiff render any service which would entitle him to receive a reward, if one had been duly offered.

Judgment for the defendants.

Nelson L. Tyler *vs.* Alanson S. Pomeroy & others.

Merely signing a paper in the hands of a municipal officer, containing a promise to serve as a volunteer for three years from the date of being mustered into the United States service, unless sooner discharged, is not sufficient to constitute one a soldier, and render him liable to be seized against his will and taken into camp; and for such a seizure by municipal officers and their agents, he may maintain an action against them, and may prove, in aggravation of damages, his mental suffering caused by the injury, and also the fact of his confinement in the guard tent, upon and immediately after being taken into camp.

In such action, votes of the town where the plaintiff lived and signed the paper referred to, instructing the selectmen to cause all enlisted men to be taken to camp, the plaintiff's declaration and acts showing his intention to enlist as a soldier, and the facts that others who signed the same paper with the plaintiff entered into the military service, that the paper signed by the plaintiff was in the usual form for enlisting recruits, and that persons who signed such papers were usually held to military service, are alike incompetent.

If in such action one of the defendants has denied on cross-examination that he said, after the seizure of the plaintiff, "We have got him, and I hope they will send him to Fort Warren," the plaintiff may introduce evidence to contradict him.

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Tort against the selectmen of Washington and two other persons, to recover damages for an assault and battery upon, and an unlawful arrest and imprisonment of, the plaintiff. The defence was that the plaintiff enlisted as a volunteer in the military service of the United States, as one of the quota of the town of Washington; that the selectmen duly received him as such; that they used no coercion upon the plaintiff; and that if an arrest of the plaintiff by either of the defendants should be proved, it was made under the authority of the selectmen, as special recruiting officers.

At the trial in the superior court, before *Vose*, J., the following facts appeared: Two of the defendants were selectmen of Washington, and, under the call of the president of the United States, made on the 2d of July 1862, for 300,000 volunteers, the governor of the Commonwealth issued an order on the 14th of July authorizing the chairman of the selectmen of Washington to enlist seven men. With this order a paper was sent, of which the following is a copy: "United States Volunteer Enlistment List. We, the undersigned, by our signatures hereto annexed, do severally agree to serve for a period of three years from the date of our being mustered into the United States service, unless sooner discharged, as volunteers from Massachusetts, in the force authorized by an act of congress of the United States, approved on the 22d day of July A. D. 1861, entitled 'An act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property,' in accordance with the provision of said act and other acts in addition thereto, and, if ordered into camp and our number is not filled to the maximum number of one hundred and one on or before the day of , we severally agree to serve in such companies as the governor and commander-in-chief may designate." Various other orders and instructions relative to this recruitment were also sent from time to time, which were put in evidence at the trial, and copies of which were annexed to the bill of exceptions, and all of which are sufficiently referred to in the opinion. While the above paper was in the hands of one of the selectmen, to whom it had been given by the chairman, the plaintiff,

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on the 29th of July, signed it. On the 11th of July he had signed a written agreement with one Higgins, reciting that they had each put into the hands of Justin Morgan one hundred dollars, to hold in trust, with the agreement that they would enlist in the military service of the United States within ten days, and each upon so enlisting should receive back his one hundred dollars, and if either did not so enlist, the other, upon so enlisting, should receive the whole money. The plaintiff, after signing the enlistment paper, refused to go into camp, upon the request of the chairman of the selectmen, and the selectmen thereupon gave directions for him to be taken to camp, and these directions were executed by the other two defendants, (one of whom was a constable,) who went to the plaintiff's house and arrested him and carried him to the camp in Pittsfield, and delivered him, with the enlistment roll, to the commandant of the camp of rendezvous, who was a commissioned officer of volunteers. The plaintiff was, by order of the commandant, confined in the guard tent of the camp for several days, after which he was released, the regiment having received marching orders.

The evidence as to the reasons and circumstances of his commitment to the guard tent was conflicting; and the plaintiff was permitted to prove, under objection, his treatment and situation there.

The defendants offered to prove various acts and declarations of the plaintiff, in war meetings of the town of Washington, for the purpose of raising their quota, tending to show that by signing the said roll he intended to place himself in the military service of the United States, and also in reduction of damages; his receipt, in consequence of signing said roll, of the money deposited under the agreement with Higgins; a vote of the town instructing the selectmen to cause all enlisted men to be taken to camp, under which vote the selectmen acted; and the fact that others who subscribed the same roll entered into the military service; but the evidence was excluded.

The defendants also called as a witness the adjutant general of the Commonwealth, and offered to ask him whether this roll was the regular and usual form of enlistment in this

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commonwealth; whether the quota from this state was enlisted upon similar rolls; and whether persons enlisted upon similar rolls were actually held to service; but the evidence was excluded.

The foregoing evidence was offered for the purpose, among other reasons, of showing good faith on the part of the defendants, and in mitigation of damages.

Alanson Pomeroy, one of the defendants, having denied on cross-examination that he said, after the arrest of the plaintiff, "We have got him now, and I hope they will send him to Fort Warren before he gets back," the plaintiff in reply was allowed to call evidence, under objection, to contradict him on this point.

The judge instructed the jury that, upon the evidence, the defendants had no lawful authority to use force upon the plaintiff, in order to take him to camp; and gave instructions as to what in law constitutes an arrest, which were not excepted to; and further instructed them, upon the question of damages, that the plaintiff was entitled to recover a just compensation for any injury to his person, and for the detention and suffering in the guard tent, and for any injury to his feelings in consequence of the mode and circumstances of the unlawful force used towards him.

The jury returned a verdict for the plaintiff, with $150.87 damages; and the defendants alleged exceptions.

J. M. Barker, (*J. D. Colt & C. N. Emerson* with him,) for the defendants. The defendants had authority to enlist volunteers, and duly enlisted the plaintiff. [The Const. of U. S., acts of congress, orders, &c., and various cases cited in the opinion were referred to, and also the following:] *In re Merritt*, 5 Hall's Law J. 497. *Mills* v. *Martin*, 19 Johns. 7. *Rathbun* v. *Martin*, 20 Johns. 343. By the plaintiff's disobedience of orders, he became liable to arrest. [See orders and authorities referred to in opinion.] If not a soldier of the United States, he was a soldier of the Commonwealth. [See above orders and authorities.] *Savage* v. *Gibbs*, 4 Gray, 601. The excluded evidence was competent. 1 Greenl. Ev. § 120. *In re Merritt*,

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ubi supra. *United States* v. *Wyngall*, 5 Hill, (N. Y.) 21. *Schuneman* v. *Diblee*, 14 Johns. 235. Damages for his detention in the guard tent were too remote. *Houghton* v. *Wilson*, 10 Gray, 365. *Allen* v. *Shed*, 10 Cush. 375. *Lock* v. *Ashton*, 12 Q. B. 871. The defendants were acting under superiors, whose orders they could not control. *Ela* v. *Smith*, 5 Gray, 142, and cases cited. Evidence of the good faith of the defendants was competent. Sedgwick on Damages, (2d ed.) 114, 154.

H. L. Dawes, (*M. Wilcox* with him,) for the plaintiff.

Gray, J. Questions of the lawfulness of acts done under color of military authority, in time of war, are among the most delicate and important that can come before a court of justice, whose duty it is equally to maintain the rightful powers of the government and to guard the subject against unlawful violence. But when their decision becomes necessary to the determination of the rights of the parties in a judicial proceeding, they must be treated in the same manner as any other question of law.

Although cases of this kind have fortunately never been common, the general principles which must guide the inquiry are well settled and may be briefly stated. With acts affecting military rank or *status* only, or offences against articles of war or military discipline, the civil courts have uniformly declined to interfere. *Barwis* v. *Keppel*, 2 Wils. 314. *In re Mansergh*, 1 Best & Smith, 406, 407, 408. *Johnstone* v. *Sutton*, 1 T. R. 546, 548, 549; S. C. *nom.* *Sutton* v. *Johnstone*, Ib. 784; S. C. 1 Bro. P. C. (2d ed.) 100. *United States* v. *Mackenzie*, 1 N. Y. Leg. Obs. 371. 1 Kent Com. (6th ed.) 341, *note*. No acts of military officers or tribunals, within the scope of their jurisdiction, can be revised, set aside or punished, civilly or criminally, by a court of common law. *Leonards* v. *Shields*, 1 McArthur on Courts Martial, (3d ed.) 159, *note*, 296; 2 Ib. 263, 264. *Grant* v. *Gould*, 2 H. Bl. 69. *Bailey* v. *Warden*, 4 M. & S. 400. *Wolton* v. *Gavin*, 16 Q. B. 48. *Luther* v. *Borden*, 7 How. 45, 46. *Wilkes* v. *Dinsman*, 7 How. 89; S. C. *nom.* *Dinsman* v. *Wilkes*, 12 How. 403, 404. *Dynes* v. *Hoover*, 20 How. 82. Least of all, will the common law undertake to rejudge acts done *flagrante bello* in the face of the enemy. *In republicâ maxime conservanda*

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sunt jura belli. Co. Litt. 11 *b.* 4 Inst. 123, 129. Petition of Right, 3 Car. I. *c.* 1, § 7. Debates of the Commons on Martial Law, 4 Car. I., 2 Rushworth's Hist. Coll. Appendix, 78–81. *Barwis* v. *Keppel*, 2 Wils. 314. *Johnstone* v. *Sutton*, 1 T. R. 546, 548, 549. *Warden* v. *Bailey*, 4 Taunt. 70.

But for a malicious exercise by a military officer of lawful authority; *Wall* v. *M'Namara*, cited in 1 T. R. 502, 536; *Governor Wall's case*, 28 Howell's State Trials, 144, 176; *Luther* v. *Borden*, 7 How. 46; *Dinsman* v. *Wilkes*, 12 How. 403–405; or for acts of a military officer or court, in excess of authority, though done in good faith, toward those in the military service, and *a fortiori* toward those who are not, where the civil laws are in full force, the person injured may obtain redress in the ordinary way, by suit against the wrongdoer. *Frye* v. *Ogle*, reported in the London Magazine for 1746, pp. 124, 125, 576, 577; stated in Prendergast's Law of Army Officers, 130–132, and in 1 McArthur on Courts Martial, 229, 344; and cited in 4 Taunt. 76, 87. *Comyn* v. *Sabine*, cited in Cowp. 169, 175, 176. *Swinton* v. *Molloy*, cited in 1 T. R. 537. *Warden* v. *Bailey*, 4 Taunt. 67; reversed in *Bailey* v. *Warden*, 4 M. & S. 400, only on the ground that the act complained of was in one view within the scope of the defendant's military authority. *Wolton* v. *Gavin*, 16 Q. B. 52, 62, 70, 79. *Wise* v. *Withers*, 3 Cranch, 337. *Ex parte Watkins*, 3 Pet. 208. *Dynes* v. *Hoover*, 20 How. 80, 81. *Fisher* v. *McGirr*, 1 Gray, 45. Massachusetts Declaration of Rights, art. 28. *Wilson* v. *Mackenzie*, 7 Hill, (N. Y.) 95. In the words of Lord Chief Justice Wilmot, "If a man be treated as a soldier, who is not duly listed or subject to military discipline, he has his action." Wilmot, 85, 86, *note.*

Was the plaintiff, then, at the time of the acts of which he complains, a soldier? The words "enlist" and "enlistment," in the law, as in common usage, may signify either the complete fact of entering into the military service, or the first step taken by the recruit towards that end. If this ambiguity is not borne in mind, the consideration of this matter may degenerate into a dispute about words. The question before us is no ordinary one of the force, construction or validity of a contract—

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whether the plaintiff has made an agreement and broken it, and is liable in damages for the breach; but of a change of *status* — whether by signing a particular paper, or by any other act, the plaintiff has changed his condition, given up some of the rights of a private citizen, and become amenable to military discipline. It becomes necessary, therefore, to ascertain the boundary between the civil and military states, and to inquire what acts, by the principles of the common law or the American constitutions, or by express provision of statute, are required to change a citizen into a soldier. By tracing the history of the mode of enlisting soldiers under the law of England, out of which our law grew, we shall be enabled more satisfactorily to answer this question.

In the reigns of Edward I. and Edward II., soldiers for foreign wars were obtained for the most part, either by calling out the king's feudal tenants by knight service, or by compulsory levies under a claim of prerogative. But the feudal service could not be required for more than forty days out of the realm, and was thus useless for prolonged wars upon the continent; and compulsory levies without consent of parliament were forbidden, as contrary to the common law, by the *Sts.* of 1 Edw. III., *St.* 2, *c.* 5, and 25 Edw. III., *St.* 5, *c.* 8. Edward III., therefore, during his wars with France, raised most of his armies under a system which had been introduced in some degree in the reign of Edward I., and continued in use until that of Henry VIII., by which nobles, knights or military leaders covenanted with the king to serve him in war for such a time with so many men, whose wages they received from the king, and who covenanted in turn with their leaders and received their wages from them, and were mustered before the king's commissioners, and their names recorded. 1 Rot. Parl. 163 *b*, 164 *a*. 2 Ib. 62 *b*, 63 *a*, 108 *b*, 329 *a*. Cotton Ab. Rec. 10, 11, 24, 35, 439, 440. *St.* 5 Rich. II., *St.* 1, *c.* 10. 3 Selden's Works, 1957. Co. Litt. 68*b*–71*a*, and Hargrave's notes. 2 Inst. 528, 529. 3 Inst. 86. 1 Hale P. C. 672, 673, 677. 1 Hallam's Middle Ages, *c.* 2, part 2, (10th ed.) 260–265. 2 Hallam's Const. Hist. Eng *c.* 9, (7th ed.) 129–133.

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By the law of England during the same period, upon certificate of a captain that any of his soldiers, after receiving wages of the king through him for foreign military service, would not go, writs issued out of chancery to the sheriffs or to sergeants at arms to arrest such soldiers and bring them into the chancery or before the king in council. See in the Register the writ *De arrestando ipsum qui pecuniam recepit ad proficiscendum in obsequium regis et non est profectus*, and the writ *Ad capiendum conductos ad proficiscendum in obsequium, qui captis vadiis ad dictum obsequium venire non curaverint.* Reg. Brev. 24, 191. "And this," says Lord Coke, in his commentary on Magna Charta, "is *lex terræ*, by process of law, *pro defensione regis et regni.*" 2 Inst. 53. Both of these writs were founded upon the soldier's having once actually submitted himself to his military leader, and alleged that he had received from his leader the king's money. The statement, therefore, of Lord Coke, in his Fourth Institute, that the writ *Ad capiendum conductos ad proficiscendum* lies by the common law "if any soldier have covenanted to serve the king in his war, and appear not at the time and place appointed," which at first sight might seem to imply that receipt of wages was unnecessary to fix the military character, must on the contrary be deemed to assume the payment of money as essential to bind the contract. 4 Inst. 128, 129.

The practice of enlisting soldiers in this manner was recognized, and the departure from their captains, without license from them, of soldiers who had thus received part of their wages, "and so have mustered and been entered of record the king's soldiers before his commissioners, for such terms for which their masters have indented," declared felony, by *St.* 18 Hen. VI. *c.* 19. The *St.* of 7 Hen. VII. *c.* 1, extended this to "any soldier, being no captain immediately retained with the king, which hereafter shall be in wages and retained, or take any prest, to serve the king upon the sea, or upon the land beyond the sea," to which the *St.* of 3 Hen. VIII. *c.* 5, § 2, by inserting "or" between "land" and "beyond," added within the realm; and also substituted "license of the king's lieutenant there" for that of the captain of the soldiers. *Resolves concerning Soldiers*, Hutton.

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135. The *St.* of 18 Hen. VI. was declared by *St.* 5 Eliz. *c.* 5, § 18, (or § 27,) to extend to all mariners and gunners "having taken prest or wages" to serve the crown upon the sea. All these statutes required actual receipt of money by the soldiers, as well as departure from their captains, to constitute desertion. But the *St.* of 2 & 3 Edw. VI. *c.* 2, (repealed by *St.* 1 Mary, *c.* 1, and revived by *St.* 4 & 5 P. & M. *c.* 3,) punished desertion by any soldier "serving the king in his wars."

In the reign of Elizabeth, after the mode of raising soldiers through indenture with their captains had fallen into disuse, all the judges of England held that the *St.* of Edw. VI. applied only to soldiers who had served in actual war; but that soldiers who had been pressed (*prest*, in the original Law French) and taken wages to serve against the Irish rebels, and were on the way towards Ireland, and, before they actually served in the war, departed from their captains without license, were guilty of felony under the *Sts.* of Hen. VII. and Hen. VIII.; and according to this opinion many soldiers were condemned and executed. *Case of Soldiers*, 2 Anderson, 151; S. C. 6 Co. 27 *a.*

It appears from these reports that the soldiers in question had been impressed to serve. Lord Hale was of opinion that *prest*, as applied in these statutes to the money received, did not necessarily imply that the service was compulsory; but that "in truth it was imprest money, *præstitium*, or the earnest of the contract between the king by the captain and soldiers." 1 Hale P. C. 675, 677. And he was clear that, in order to make a felony under the *Sts.* of Hen. VII., Hen. VIII. and Eliz., it must be alleged and proved, "1. That either they received wages, or took *prest* to serve the king upon sea or land; 2. That he that thus *impresteđ* them was commissioned by the king so to imprest them." Ib. 679. In those times, much weight was given to the payment of part of the consideration money of any agreement by way of earnest to bind the bargain, a vestige of which is still found in the provision of the statute of frauds concerning the sale of goods of considerable value without a written memorandum, which has come down to us from the

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English statute passed in the reign of Charles II., in the framing of which Lord Hale is said to have taken part.

The decision of the judges in the reign of Elizabeth upon the statutes of soldiers is further explained by an opinion given by their successors to Charles I. upon the question whether soldiers were guilty of felony under the *Sts.* of Hen. VII. and Hen. VIII., who had taken pay, and (as stated in the report by one of the judges) been enrolled, or (as another has it) made an agreement with the deputy lieutenant that a certain conductor should lead them to the place of rendezvous, and were accordingly delivered to the conductor to be brought to the sea side, and then withdrew themselves and ran away without license. A majority of the judges (Hutton, Croke and Yelverton, dissenting) were of opinion that such a conductor, although holding no military rank, was a captain within these statutes. It may well be doubted whether this was not too harsh a construction; and the opinion of the judges of that reign in favor of the crown against the subject is not of the highest authority especially with such a weighty dissent. But the deputy lieutenant here mentioned was "the king's lieutenant" mentioned in the *St.* of Hen. VIII. above cited, perhaps the lord lieutenant of the county, in either aspect a purely military officer. 2 Hallam's Const. Hist. Eng. *c.* 9, (7th ed.) 134. And even those twelve judges "unanimously agreed, that if one takes press money, and when he should be delivered over he withdraw himself, this is not felony, although he is hired and retained to serve." *Resolves concerning Soldiers*, Hutton, 134; S. C. Cro. Car. 71. This opinion puts it beyond doubt that soldiers must have both received money and come under actual command of a leader, to warrant their punishment as deserters under those statutes. And Judge Jenkins says, "It seems that these statutes are only a declaration of the common law." Jenk. 271.

As lately as the reign of Charles II., the greatest lawyers in England overlooked the distinction between martial and military law — between the military rule, not limited to the army, which prevails in time of war, when the civil laws have lost their force, and the military discipline, necessary to the government of an

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army at all times; and punishment by military authority in time of peace, even of the king's soldiers, was hardly allowed. 1 Hale's Hist. Com. Law, (5th ed.) 54, 56. *Ekins* v. *Newman*, T. Jones, 147. James II. indeed established articles of war for the government of his troops. 14 Law Mag. 4. But he was obliged to resort to the courts of law and the statutes already cited for the punishment of deserters; and this at a time when he could and did arbitrarily remove half of the judges of the king's bench for refusing to order a deserter thus convicted in one county to be illegally executed in another. *The King* v. *Beal*, 3 Mod. 124; S. C. *nom. The King* v. *Dale*, 2 Show. 511; S. C. 12 Howell's State Trials, 262, *note*.

After the accession of William and Mary, a standing army being found necessary, parliament retained the control of it by establishing it for only a year at a time; and these annual acts first made mutiny and desertion punishable at the sentence of a court martial in time of peace, and are therefore known as the Mutiny Acts. The earliest of these was limited to persons "being in their majesties' service in the army, and being mustered and in pay as an officer or soldier." *St.* 1 W. & M. *c.* 5, § 2. This clause was reënacted in the same form, thus requiring both mustering and pay to constitute the military character, until early in the following reign, when either was made sufficient, and the act extended to "every person being in her majesty's service in the army, or mustered or in pay as an officer, or listed or in pay as a soldier." *Sts.* 6 Anne, *c.* 18, (often cited as 5 & 6 Anne, *c.* 16,) § 2; 7 Anne, *c.* 4. But within five years after the passage of the first mutiny act, a section was inserted providing that no person should be "esteemed a listed soldier, or be subject to any of the pains or penalties of this act, or any other penalty for his behavior as a soldier," unless he should before a civil magistrate "declare his free consent to be listed or mustered as a soldier, before he should be listed or mustered or inserted on any muster roll of a regiment, troop or company." *St.* 5 & 6 W. & M. *c.* 15, § 2. And the law of England has since by similar provisions required either enlistment by a military officer, with full opportunity to reconsider and retract, in the

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case of a soldier, or actually being mustered or commissioned in the case of an officer, to subject either to military discipline; allowing however the alternative of being in pay to avoid the necessity of discussing the nature of the engagement or mode of contracting it. See *Methuen* v. *Martin*, Sayer, 107; *Grant* v. *Gould*, 2 H. Bl. 103, 104; 1 McArthur on Courts Martial, 195, 196; *Bradley* v. *Arthur*, 4 B. & C. 308; *Wolton* v. *Gavin*, 16 Q. B. 48; Thomson's Military Forces of Great Britain, 92, *& seq.* That the original enlistment of a recruit, or payment of money to him, must be made by some person having the necessary military authority, in order to justify forcibly restraining him, is shown by the case in which a drummer, who had no lawful power to enlist recruits, upon being urged by a man to enlist him, gave him a shilling for that purpose; the man afterwards attempted to escape, and was opposed by the drummer and a private soldier with him, and the latter stabbed one who was assisting the escape; and the twelve judges held that he was liable to indictment for wilful stabbing. *Rex* v. *Longden*, Russ. & Ry. 228.

The articles of war, reported by a committee of which Adams and Jefferson were members, and established by the congress of the Confederation in 1776, within three months after the Declaration of American Independence, substantially adopted the provisions of the English mutiny acts; and required every recruit to be enlisted by a military officer and taken before a civil magistrate and there have the articles of war read to him and take the oath of allegiance and service; yet allowed the receipt of pay from the government to be conclusive evidence of enlistment; and declared that "all officers and soldiers who, having received pay, or having been duly enlisted in the service of the United States, shall be convicted of having deserted the same, shall suffer death or such other punishment as by sentence of a court martial shall be inflicted;" and that these articles "are to be read every two months at the head of every regiment, troop or company, mustered or to be mustered in the service of the United States; and are to be duly observed and exactly obeyed by all officers and soldiers who are or shall be in the said

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service." Articles of War of September 20, 1776, § 3, art. 1; § 6, art. 1; § 18, art. 1; 2 Journals of Congress, 367, 369, 380. 3 John Adams's Works, 83, 84.

After all powers of war and peace had been granted by the Constitution to the national government, the Congress of the United States established similar articles. U. S. St. 1806, *c.* 20, arts. 10, 20, 101, 2 U. S. Sts. at Large, 361, 362, 371. The oath was permitted, by the *St.* of 1806, to be taken before the judge advocate, and by the *St.* of 1861, *c.* 42, § 11, before any commissioned officer of the army. 12 U. S. Sts. at Large, 289. Taking the recruit before the civil magistrate is thus dispensed with, but his engagement with a military officer is essential.

It was argued that the tenth article of war, which provides that "every non-commissioned officer or soldier who shall enlist himself in the service of the United States," shall have the articles of war read and the oath administered to him, shows that the oath can be administered to none but soldiers, and therefore the recruit must be a soldier before the oath could be administered to him. But it might equally well be contended that the use of the words "every soldier who shall enlist himself," instead of "shall have enlisted himself," shows that he must be a soldier before he enlists. The description of the recruit as a "non-commissioned officer or soldier" in this article is not intended to denote what he is already, but what he will be when his enlistment is complete.

A statute was passed near the close of the last war with England, authorizing recruiting officers of the army to enlist any one between the ages of eighteen and fifty years, "which enlistment shall be absolute and binding upon all persons under the age of twenty-one years as well as upon persons of full age, such recruiting officers having complied with all the regulations of the law regulating the recruiting service." U. S. St. 1814, sess. 3, *c.* 10, 3 U. S. Sts. at Large, 146. That statute did not undertake to fix what should constitute an enlistment, but referred for that to the previous laws. The object of the provision just quoted was simply to enable minors to be held like persons of full age; and the statute has always been considered as having

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been repealed by the act passed at the same session, fixing the military peace establishment of the United States. U. S. St. 1815, *c.* 79, Ib. 225. *Ex parte Kimball*, 9 Law Reporter, 502, 503.

In addition to the power to raise, support and regulate armies congress is vested by the Constitution with authority to provide for organizing, arming and disciplining the militia, for calling them into the service of the United States to execute the laws of the Union, to suppress insurrections and repel invasions, and for governing them when employed in the national service. Under this power to organize, congress has the exclusive power of determining who shall constitute the militia; and all persons coming within the class defined by congress are members of the militia, without any act of their own. *Opinion of Justices*, 14 Gray, 614. *Commonwealth* v. *Cushing*, 11 Mass. 71. *Whitmore* v. *Sanborn*, 8 Greenl. 310. U. S. St. 1862, *c.* 201, 12 U. S. Sts at Large, 597. Signing an enlistment list is not required to make them militia, and does no more than ascertain the particular company in which they shall serve, and perhaps estop the signers to claim exemption afterwards. Decisions or statutes, like those cited by the defendants, that such a signing is evidence of enlistment in a volunteer militia company, have therefore no bearing upon the question of what constitutes a soldier of the United States. *Bullen* v. *Baker*, 8 Greenl. 391 Gen. Sts. *c.* 13, § 18.

A nearer analogy may be found in the entry of the militia into the service of the Union, when called out by congress. This is well settled by the decisions of the supreme court of the United States to be upon their arrival at the place of rendezvous, and not before. *Houston* v. *Moore*, 5 Wheat. 20, 36, 53, 61. *Martin* v. *Mott*, 12 Wheat. 15. Some of the reasons given by the justices apply with great force to the case before us. "The arrival of the militia at the place of rendezvous," said Mr. Justice Washington, "is the *terminus a quo* the service, the pay, and subjection to the articles of war are to commence and continue. If the service, in particular, is to continue for a certain length of time from a certain day, it would seem to follow, almost conclusively,

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that the service commenced on that, and not on some prior day." 5 Wheat. 20. Mr. Justice Story added, "It would seem almost absurd to say that those men, who have performed no actual service, are yet to receive pay; that they are 'employed,' when they refuse to be employed in the public service; that they are 'acting' in conjunction with the regular forces or otherwise, when they are not embodied to act at all; or that they are subject to the articles of war as troops organized and employed in the public service, when they have utterly disclaimed all military organization and obedience. There are the strongest reasons to believe that by employment 'in the service,' or, as it is sometimes expressed, 'in the actual service' of the United States, something more must be done than a mere calling forth of the militia; that it includes some act of organization, mustering or marching, done or recognized." Ib. 63.

Attorney General Legaré, in an opinion to the secretary of war in 1841, on the payment of the Florida militia, expressed like views, saying, "It is only when called out into actual service that the militia are subjected to the exclusive control of the federal authorities. Until detachments from it have been actually mustered, to be subjected in a solemn and authentic form to the articles of war, as in the parallel case of voluntary enlistment, the body of the people, armed and disciplined in self defence, (for that is the definition of the militia,) stand in all respects upon the same footing as in any other of their great political relations. Nor will anything short of this formal dedication, so to express it, of portions of it to military responsibilities, and actual embodying of them into masses, under the rules and regulations of war, constitute them a part of the federal army." 3 Opinions of Attorneys General, 691.

The standing army of the United States has always been inconsiderable in number, and the policy of the government has not favored sudden increase and decrease of the regular forces. The power of calling out the militia has been exercised for short periods, both in order to avoid unnecessarily disturbing the usual occupations of the citizens, and because the militia were unfitted for long service. Congress, therefore, whenever

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there has been need of an unusually large military force, has resorted to an intermediate method of obtaining soldiers, by authorizing the president to accept the services of volunteers, either for a particular war, or for a period estimated by the probable duration of hostilities. The government thus appeals directly to the patriotism of the people, relying upon the fundamental principle of society, the mutual obligation of protection and support, which is expressed in the simplest words and the closest connection in our own Declaration of Rights. "Each individual of the society has a right to be protected by it in the enjoyment of life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary." Declaration of Rights, art. 10.

In providing for calling out volunteers, congress has usually lodged the appointment of officers of the regiments and companies, where the Constitution left the appointment of militia officers, with the States. One exception to this course is to be found during the last war with England, when congress at first authorized the president to accept of "companies of volunteers, either of artillery, cavalry or infantry, who may associate themselves for the service," who should be armed and equipped at the expense of the United States "after they shall be called into the service," and their officers appointed according to state laws; and who should be bound to continue in the service for the term of twelve months after they should "arrive at the place of rendezvous, unless sooner discharged; and, when called into the service and while remaining there," should be under the same rules and regulations and be entitled to the same pay as the regular troops of the United States. U. S. St. 1812, *c.* 21, 2 U. S. Sts. at Large, 676. Six months afterwards congress by a supplemental act provided that the president might appoint and commission the officers, "provided that prior to the issuing of such commissions the volunteers aforesaid shall have signed an enrolment binding themselves to service, conformably to the provisions of the act to which this is a supplement." U. S. St. 1812, *c.* 138, Ib. 785. But there is nothing in that act to show

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that those volunteers, before they had assembled at the place of rendezvous, or the officers appointed by the president had assumed command of them, were to be treated as soldiers subject to military discipline.

During the war with Mexico the president was authorized to accept the services of volunteers, "to serve twelve months after they shall have arrived at the place of rendezvous, or to the end of the war, unless sooner discharged, according to the time for which they shall have been mustered into the service," who, "when mustered into the service, shall be armed at the expense of the United States," and, "when called into actual service, and while remaining therein, be subject to the rules and articles of war," and be accepted by the president in companies, battalions, squadrons or regiments, with officers appointed according to the laws of the states. The same act provided that "whenever the militia or volunteers are called and received into the service of the United States, under the provisions of this act, they shall have the same pay and allowances." U. S. St. 1846, *c.* 16, 9 U. S. Sts. at Large, 9, 10. And congress afterwards made provision for refunding to "states, counties, corporations, or individuals, either acting with or without the authority of any state," the amount of any necessary or proper expenses incurred in organizing, subsisting and transporting volunteers, "previous to their being mustered and received into the service of the United States during the present war." U. S. St. 1848, *c.* 60. Ib. 236.

Upon the breaking out of the existing rebellion, the president summoned congress together, and called out the militia first, and then volunteers to serve for a period of three years, unless sooner discharged, and "to be mustered into the service as infantry and cavalry." Proclamations of April 15th and May 3d, 1861, 12 U. S. Sts. at Large, Appendix. Congress, upon assembling, ratified the acts of the president; authorized him to accept the services of volunteers, for any time not exceeding three years nor less than six months, in such numbers from each state as he might determine, and to form them into regiments, the officers of which should be appointed by the governors of the

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States; and enacted that these volunteers should be "mustered into the service for three years" or "during the war," be subject to the rules and regulations governing the army of the United States, and be upon the same footing in all respects with similar corps of the regular army. U. S. Sts. 1861, *cc.* 9, 17, 34, Ib. 268, 274, 279. Provision was also made for the payment of "all volunteers mustered into the service of the United States," from the time of their organization and acceptance as companies by the governors of the states. U. S. Sts. 1861, *cc.* 16, 63. Ib. 274, 326.

By an act of February 13th 1862, "no person under the age of eighteen shall be mustered into the United States service;" and "no volunteers or militia from any state or territory shall be mustered into the service of the United States on any terms or conditions confining their service to the limits of said state or territory," with certain exceptions in Maryland and Missouri. U. S. St. 1862, *c.* 25, §§ 2, 3. Ib. 339.

On the 21st of June 1862, congress resolved that "every soldier who hereafter enlists, either in the regular army or the volunteers, for three years or during the war, may receive his first month's pay in advance, upon the mustering of his company into the service of the United States, or after he shall have been mustered into and joined a regiment already in the service." U. S. Res. 37. Ib. 620. The order of the war department under this resolution, together with a like order offering payment of a portion of the bounty allowed by law "upon the mustering of the regiment to which such recruits belong into the service of the United States," were set forth in the governor's proclamation of July 2d 1862, which is annexed to the bill of exceptions.

By the army regulations, "when volunteers are to be mustered into the service of the United States, they will at the same time be minutely examined by the surgeon and assistant surgeon of the regiment;" and "no volunteer will be mustered into the service who is unable to speak the English language." Revised Army Regulations of 1861, §§ 1666, 1670.

All these acts of the national legislature and executive look to the mustering of the volunteers into the service of the United

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States as the beginning of their military condition. Some of them use, as synonymous with "mustered," the words "received into the service," or "called into service," which last, as applied to the similar case of militia, had received the highest judicial exposition in the case of *Houston* v. *Moore*, above cited. There are many later public acts to the same effect. But we have confined our citations to those preceding the call of July 1862, under which the defendants acted.

It was argued, upon the etymological derivation of the word "muster" from the Latin *monstrare*, "to show," that "mustering" was only showing that the persons mustered were at the time of the muster in the service, and that "mustering into the service" was only the first time they were mustered after being in the service. But although the word "muster" by itself may doubtless be applied to a parade of soldiers already enrolled, armed and trained, the addition of the preposition of motion removes all ambiguity, and "mustering into the service," or "mustering in," clearly implies that the persons mustered are not already in the service.

The action of the selectmen of Washington toward the plaintiff was founded on an entire misapprehension of the nature of their powers and duties. The appeal of the president was made through the governor of Massachusetts, as the chief executive authority of the Commonwealth, for its quota or proportion of men, the mode of raising which was left to him. He proceeded to organize a system by which the patriotism of the people might promptly and effectively meet the president's call. But that call was for volunteers, and to be responded to voluntarily. The president commissioned no military officers to obtain recruits; the militia organization of the State was unsuitable, as had in fact been assumed in the very call for volunteers; and new regiments were needed, of which no officers had yet been appointed, as well as men to fill up the ranks of old regiments. The whole Commonwealth had long been divided into cities and towns, the officers of which, chosen annually by the people, were well known and trusted by them. To these officers the governor appealed. They held no military commission,

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they were subject to no military discipline, and clothed with no military authority. They were called upon simply as representatives of their fellow-citizens, to excite and assist them in the performance of the patriotic duty of uniting in the active support of the government of the country. They were to explain to them the nature of the service to be undertaken, obtain their promises to engage therein, show them the way to the rendezvous, and pay their expenses thither.

A more particular examination of the orders of the governor, introduced in evidence at the trial, shows his action to have been in exact accordance with this view. On the 2d of July, the day of the publication of the president's call, the governor proclaimed to the people of Massachusetts the president's "desire and readiness to receive a large accession to the volunteer military force now in the field," both by filling up existing corps, and by new regiments; and gave notice of the advance pay and bounties which recruits would receive upon the mustering of their companies or regiments into the service of the United States, or upon joining regiments already in the service, and of the premium to be paid to any person for each accepted recruit brought to the rendezvous. On the 7th of July he published a table of the proportions due from each city and town, according to the number of enrolled men liable to military duty; and "urgently requested mayors of cities and selectmen of towns to exercise their official and personal influence to furnish their quotas." A week later he issued to the selectmen a certificate of their authority to enlist a number of men equal to their quota; and immediately afterwards issued detailed instructions, "respectfully asking the coöperation of all municipal officers in this duty," advising them to accept no man incompetent for military service, and directing them to "forward" the recruits in squads to the camps of rendezvous, with directions to report to the general receiving officer there. His orders contain no express words empowering the municipal authorities to exercise force over the recruits; and such a power cannot be implied. They were not authorized to compel or even command the recruits to proceed to the rendezvous. They had no

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authority to pay any money to recruits, to administer any oath, to perform any ceremony of mustering, or to require any obedience. That the enlistment of the recruits was not considered yet complete is shown by the direction to send with each squad a list, (which might be by the hand of any civil officer or private citizen, or even of one of the very recruits,) signifying "the corps into which each proposes to enlist." And it was only after arriving at the rendezvous, and being examined by a surgeon, that the recruits were to be mustered into the service. Those rejected by the surgeon were to be returned to their municipality, and not allowed as a part of its quota. Clothing, equipment and subsistence were first provided for the recruits after being mustered in. There was no authority to pay them any wages, bounty or earnest money before that time. Only the expenses of transportation to the rendezvous were reimbursed to the municipal officers. Such was the whole extent of the orders under which the selectmen of the town of Washington acted in enlisting the plaintiff. They clearly conferred no authority upon the defendants to compel the plaintiff to take a single step toward becoming a soldier against his consent.

An examination of the position in which the plaintiff stood leads to the same conclusion. Congress had authorized the enlistment of volunteers for no longer term than three years. U. S. St. 1861, *c.* 9. The only act done by the plaintiff toward entering the service was to sign an agreement "to serve for a period of three years from the date of being mustered into the service, in accordance with the act" just referred to. He never agreed to enter the service or become a soldier immediately. He never submitted himself to, nor contracted any engagement with, any military officer. He never received any money from any officer, military or civil, of the state or nation, nor any rations, uniform, arms or equipments. He never was examined by a surgeon, nor took any oath, nor was mustered into the service. And he never actually served as a soldier. But when called upon by the selectmen to go to the rendezvous, he absolutely refused to do so, and was by them forcibly taken to the camp of rendezvous and delivered to the commandant, who imprisoned him in

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the guard tent for some days; and immediately upon being released he brought this action against the selectmen and their assistants to recover damages for his arrest and imprisonment.

After the fullest consideration, we are unanimous in the opinion that the plaintiff was not a soldier, nor subject to any military authority or discipline as such. The statutes and orders already cited seem to assume the mustering of a recruit into the service as the point at which the right to exercise military restraint over him is intended to begin. We are not however prepared to say that actual submission as a soldier to a commissioned officer would not be of itself sufficient. Still less would we be understood as intimating that a recruit of full age, who had actually served, or received money from the government, could be allowed to dispute the regularity or completeness of his enlistment. But we can have no doubt that the mere signing of a paper in the hands of a municipal officer, containing a promise to serve from a future day, to be fixed only by the performance of a distinct act, is not sufficient to change the state of a citizen into that of a soldier.

In the cases of *Kimball, Murray and Stone*, 9 Law Reporter, 500, in which this court refused to discharge on *habeas corpus* minors who had enlisted with the consent of their parents in a company of the volunteer forces raised for the Mexican war, the petitioners had been mustered and received into the service of the United States; and no question was raised of the completeness of the enlistment.

The case of *Dew*, 25 Law Reporter, 538, does not help the defendants. In that case Mr. Justice Merrick decided that a minor who had not only enlisted, but also, as the report states, drawn rations and clothing and done duty as a soldier, could not be taken by writ of *habeas corpus* out of the custody of a military officer holding him to await the result of a court martial upon charges filed against him for a military offence committed while in the service. Of the correctness of that decision we have no doubt. It rests upon the principle that where two governments have jurisdiction over the same territory, a person held for trial by the courts of the one cannot be taken

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out of their custody by the courts of the other. But it has no tendency to show that if the petitioner in that case had neither received any pay, rations or clothing, nor submitted to any military officer, nor done any military duty, nor committed any military offence, military authority could have been exercised over him by virtue of the simple signing of a contract of enlistment, even if he had been of full age.

Our judgment in the case at bar corresponds with the decision of Judge Sprague — and there is no judge whose opinion upon such a question has greater weight — in a case recently tried in the district court of the United States, under the act of Congress of 1855, *c.* 136, § 11, punishing the enticing of any seaman, "who may have enlisted into the naval service of the United States," to desert therefrom. A seaman had been examined by a surgeon and passed through all the necessary steps at the naval rendezvous in Boston, signed shipping articles which stated the date and term of his enlistment, and received orders to go on board the receiving ship and for his advance pay; but, on reaching the ship, was found to be so intoxicated that the commanding officer, in accordance with the instructions of the navy department, declined to receive him until he should become sober; and he then left the ship, promising to return the next morning, but was meanwhile enticed away by the defendant. He was held not to be an "enlisted seaman," because he had done no duty, had been paid no money, and was not entitled by the regulations of the navy department to any pay until after being passed on the receiving ship. 10 U. S. Sts. at Large, 628. *United States* v. *Thompson*, 27 Law Reporter, . See also *Bamfield* v. *Abbot*, in the same court, 9 Law Reporter, 510.

As the plaintiff was not a soldier, he could not of course be a deserter. There is therefore no occasion to examine the extent of the authority claimed by the defendants under the instructions from the acting provost marshal of the Commonwealth for the arrest of deserters from the military service of the United States.

It was argued for the defendants that the plaintiff, if not a soldier of the United States, had become, by signing the enlistment

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paper, a soldier of the Commonwealth of Massachusetts, bound to do all acts in his power to place himself in a condition to be mustered into the service of the United States, and to this end to obey the order of the selectmen to report himself at a camp of rendezvous, and was rightly arrested by the defendants for disobedience of such an order. But the court can see no ground for this position. The selectmen had no military authority, either as state or as national officers, and no legal right to make such an order. The plaintiff never made any agreement to become a soldier of the Commonwealth. He was not called out as one of the militia, nor is there any evidence that either of those who restrained him of his liberty was a militia officer. The provisions of the Gen. Sts. *c.* 13, to which the defendants have referred upon this point, relate solely to the militia in the service of the Commonwealth, not to volunteers called out by congress to increase the army of the Union. *Ex parte Kimball*, 9 Law Reporter, 503. *Bamfield* v. *Abbot*, Ib. 510.

The plaintiff not being a soldier nor subject to military discipline, the justification of the defendants fails, and they are liable in this action. It only remains for us to examine the rulings of the presiding judge upon the admission and exclusion of evidence, and the measure of damages.

The bill of exceptions does not show that the plaintiff at the trial offered any evidence of malice or ill will on the part of the defendants toward him. It is therefore unnecessary to consider how far such evidence, if introduced, could have been rebutted by evidence of good faith.

The vote of the town could give no validity to the action of its selectmen in arresting the plaintiff. By the well settled law of the Commonwealth, towns in their corporate capacity have no power to raise soldiers, nor to do any act or vote any money on that subject, without authority of the legislature. *Stetson* v. *Kempton*, 13 Mass. 280. *Hunnewell, petitioner*, 9 Law Reporter, 506. *Fowler* v. *Selectmen of Danvers*, *ante*, 80.

The fact that other recruits, who signed the same enlistment paper as the plaintiff, reported at the camp of rendezvous and were received into the service of the United States, had no

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tendency to prove that he was in that service before he had reported or been received there.

The acts and declarations of the plaintiff in the meetings held for the purpose of raising the quota of the town were offered, as the bill of exceptions states, "to show that, by sign-ing the said roll, he intended to place himself in the military service of the United States, and also in reduction of damages." But intention will not make a man a soldier, unless accompanied or followed by the acts necessary to constitute a change of his state from civil to military. The question before us is not what he intended to do, but how much he actually had done, how far his intention had been carried out, when the defendants assumed to exercise military authority over him. If he was not then a soldier, his previous expressions of an intention to become one, or even his supposition that he was, would not make him one. The fact of his having received back the money deposited under his agreement with Higgins could not estop him to deny that his enlistment was complete; nor was the opinion of Higgins, or of the stakeholder, upon that question, of any greater weight than his own. We do not understand that the defendants now insist upon the admissions of the plaintiff, or his receipt of this money, in reduction of damages. They certainly furnish no evidence of which the defendants can avail themselves.

The questions which the defendants proposed to put to the adjutant general were rightly excluded as immaterial. Proof that the enlistment paper signed by the plaintiff was in the form commonly used in this commonwealth could not aid the defendants, without showing that the plaintiff had done some further act to make him a soldier. Testimony as to the usual mode of enlisting volunteers, or the actual holding in the service of persons enlisted on such papers, would have no bearing upon the question at what stage of the enlistment the right of forcible restraint begins, or by whom it may be exercised.

One of the issues raised by the answer and tried before the jury was whether the plaintiff was forcibly arrested by the defendants or went to the rendezvous of his own accord. Upon

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that issue, and also to show the bias of the defendant Pomeroy as a witness, the evidence admitted to contradict his testimony on cross-examination was competent. *Collins* v. *Stephenson*, 8 Gray, 438.

In an action of this nature, to recover damages for injuries caused by unlawful force intentionally exercised upon the plaintiff, the defendants are liable both for the bodily suffering, and for the injury to the plaintiff's feelings occasioned by the wrongful act. *Stowe* v. *Heywood*, 7 Allen, 122, 123, and cases cited.

The only remaining exception is to the admission of evidence of the plaintiff's imprisonment in the guard tent at the rendezvous by order of the military commandant there, and to the instruction that the circumstances attending that imprisonment were admissible in evidence upon the question of damages. But such detention was a direct consequence, indeed an immediate continuation, of the unlawful arrest and imprisonment. The plaintiff, not being a soldier, was at perfect liberty to decline to become one, and guilty of no breach of military duty in so declining; and the defendants, not being military officers, can no more shelter themselves under a military subordination to the commandant of the camp than under a military authority over the plaintiff. Neither that commandant, nor any of the defendants having any legal right to restrain the plaintiff by force, they were all trespassers, and the defendants were liable for all the consequences of their acts, including the imprisonment at the camp, as well as the previous arrest and detention. This case is thus distinguished from that of *Ela* v. *Smith*, 5 Gray, 142, cited by the defendants.

The defendants relied on the case of *Lock* v. *Ashton*, 12 Q. B. 871, in which it was held that one who had been taken before a magistrate on a charge of felony, remanded by the magistrate, and afterwards discharged, could not in an action of trespass for false imprisonment against the person who gave him in custody, recover damages for the remand by the magistrate. But in that case the magistrate acted in the discharge of his judicial duty. On the other hand, a complainant who obtained a warrant from a magistrate having no jurisdiction,

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and induced an officer to arrest the party complained of, was held by this court liable in damages to the party arrested. *Emery* v. *Hapgood*, 7 Gray, 55. So Lord Ellenborough held that a person who falsely and positively stated to the commander of a press gang that another person was liable to impressment as a seaman, in consequence of which the latter was impressed, was held liable to an action for the trespass and false imprisonment, without proof of malice. *Flewster* v. *Royle*, 1 Camp. 187. And in an action brought by a marine against the commander of a naval expedition for wrongful imprisonment, on board his ship, and also on shore in a fort of the local authorities at the Sandwich Islands, the supreme court of the United States held that the jury, if they found for the plaintiff, might take into consideration his imprisonment on shore, the situation and condition of the place, the character of the person by whose authority it was governed, and his food, clothing, and general treatment there. *Dinsman* v. *Wilkes*, 12 How. 405. These authorities fully support the right of the plaintiff in this action to recover damages for his whole imprisonment, both before and after he was brought to the camp of rendezvous.

There being no error in the rulings or instructions of the presiding judge upon any question raised at the trial, the plaintiff is entitled to judgment upon the verdict which the jury have rendered in his favor. *Exceptions overruled.*

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF FRANKLIN AND HAMPSHIRE, SEPTEMBER TERM 1864, AT NORTHAMPTON.

PRESENT:

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. EBENEZER R. HOAR,
HON. HORACE GRAY, JR., } JUSTICES.

FRANKLIN COUNTY.

JOSEPH SEARS *vs.* CHANDLER VINCENT.

If the subject matter of a suit at law is submitted to arbitration, an award that the plaintiff shall pay all the costs of the suit is by necessary implication a finding that he shall recover no damages.

Under a submission authorizing arbitrators to determine how much shall be paid for the grant of a right of way, they may award that nothing shall be paid therefor.

If parties to a suit at law submit the subject matter thereof to arbitration, and include in the submission separate matters, one of which affects the rights of a third person, an award in favor of the defendant, as to the subject matter of the suit, will be a bar to the further prosecution of the action, although it may not be binding upon such third person.

A valid award needs no ratification.

TORT to recover damages for an assault and battery, and for the interruption of the plaintiff in his use of a right of way

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over land of the defendant. By an amended answer, the defendant set up an award of arbitrators, embracing the subject matter of the action.

At the trial in the superior court, before *Wilkinson*, J., it appeared that after the commencement of the action the parties entered into a submission to arbitration, by mutual bonds, as follows: The bond of the plaintiff to the defendant recited that the parties had agreed to submit "all matters of controversy between them, growing out of an alleged assault and battery made by said Vincent upon said Sears," and also "all claims for damages for an alleged interruption of a right of way which the said Sears claimed over said Vincent's land to land of Joseph H. Sears," and "other matters as to the right of way, as more fully set forth in the bond from said Vincent, this day given to said Sears, including also the costs of the suit now pending in the superior court."

The bond of the defendant to the plaintiff recited that a controversy had arisen, as stated in the other bond, and that the parties had agreed to submit "all matters of controversy, in relation to the matters aforesaid," to referees, whose award was to be made within a reasonable time; and continued as follows: 'Said referees are to say whether said Sears is entitled to any damage, and if any how much, for the alleged assault and battery; also what damage, if any, from the alleged disturbance of the right of way claimed as aforesaid. Said referees shall also determine who shall pay the costs of the suit now pending in the superior court." "Said referees are also to decide whether the owner of the land occupied by said Sears, and owned by said Joseph H., as aforesaid, has a right of way." "And, if they decide that there is no such right of way, then they shall determine how much shall be paid to said Vincent for said right of way."

The referees made and published to the parties the following award: "1. That neither said Joseph Sears nor his son Joseph H. Sears ever had a right of way to the land involved in dispute. 2. That Mr. Vincent shall give to Joseph H. Sears a free and clear deed, without compensation, securing to him a right

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of way from said Vincent's house to the lot of land" owned by Joseph H. Sears. "3. That Joseph Sears shall pay all the costs of the suit which was pending in the superior court at Greenfield, from which suit this reference had its origin. 4. That the parties, viz.: said Sears and said Vincent, shall each for himself pay the witnesses called by him, and each for himself pay also one half the costs for the services of the referees and the expenses of their sessions. When these costs respectively and fully shall be paid to the satisfaction of the chairman of this reference, Mr. Joseph H. Sears shall be entitled to his deed of right of way aforementioned, and Mr. Chandler Vincent fully absolved from the obligation of the bond he has given, as referred to above, and from all further action or liability in the case submitted for our decision."

About six months afterwards, the referees made a supplementary paper, setting forth that they had learned that Joseph Sears was disposed to say that they had not fully determined all the matters submitted to them, and adding the following: "As to damage for injuries received by Mr. Sears from Mr. Vincent, we were not convinced that he was entitled to any damages whatsoever."

It appeared that the defendant tendered to the plaintiff a sufficient deed of the right of way, in compliance with the award; and the judge instructed the jury to return a verdict for the defendant, which they accordingly did. The plaintiff alleged exceptions.

S. T. Field, for the plaintiff.

D. Aiken, for the defendant.

METCALF, J. The jury were rightly instructed, we think, that the award set forth in the defendant's answer was a bar to this action. The first objection made by the plaintiff to this ruling is, that the referees did not decide all the matters submitted to them, because they did not decide whether he should recover anything, or if anything how much, for the assault and battery, nor how much should be paid to the defendant for granting a right of way to Joseph H. Sears, the owner of the land occupied by the plaintiff. As to the damages for the assault and

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battery, the award, as originally made, directed that the plaintiff should "pay all the costs of the suit pending in the court from which the reference had its origin." This was, by necessary implication, a decision that he should recover no damages for his alleged cause of action. *Stickles* v. *Arnold*, 1 Gray, 418. *Traquair* v. *Redinger*, 4 Yeates, 282. But if this were not so, the supplement to the award would be conclusive of this matter. And as to the amount to be paid to the defendant for a grant of a right of way, the award was, that he should give to Joseph H. Sears "a free and clear deed, without compensation, securing to him a right of way" over the land described in the plaintiff's and defendant's arbitration bonds. It is true that it was one of the conditions of the defendant's bond, that if the referees should decide that there was not already such a right of way, "they should determine how much shall be paid" to the defendant for such right. But this did not require the referees to award any sum therefor, if in their judgment nothing ought to be awarded. Besides; as the defendant does not object to this part of the award, but has tendered a deed of a right of way, as directed by the referees, we do not see any legal ground for objection thereto by the plaintiff.

The plaintiff's second objection to the ruling at the trial is, that the submission did not authorize the disposition that was made, if any was made, of his claim for damages, 1st. Because the claim for damages and the right of way were separate matters, affecting different parties. But those separate matters were distinctly submitted to the referees, by the parties to the action, under an agreement that they should decide each and all of them; and, so far as these parties are concerned, they are concluded by the award, whatever effect it may have, or whether any, on the obligations of Joseph H. Sears. The plaintiff was in possession of the land of said Joseph H. over which a right of way was claimed; and the referees declared that they deemed the right of way, which they awarded to him, to be virtually the same as if given to the plaintiff. And it was expressly submitted to the referees to decide on what terms the defendant should convey a right of way, not to the plaintiff, but to Joseph

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H. Sears. We therefore need not inquire whether an award directing an act to be done to a stranger, which appears to be for the benefit of one of the parties to the submission is valid, if not provided for by the submission. See Kyd on Awards, (1st ed.) 104, *& seq.*; (2d ed.) 158, *& seq.* 2. It is objected that there was no agreement by the plaintiff to pay for a right of way the amount determined by the referees; that Joseph H. Sears was to pay for that right, if he should accept the deed thereof; but that it was optional with him to pay the amount and take the deed, or not; and that the referees have decided that he shall have the deed upon the plaintiff's paying cost, to their satisfaction. The answer to this is, that the referees decided all the matters submitted to them by the parties to the action, conformably to the conditions of the arbitration bonds. And we need not determine whether, on a suit upon the bond of either party for refusal to perform the award, it would be held that he was bound to perform everything therein directed. The award, so far as it affects the plaintiff's right to recover damages, is clearly valid, and may, if necessary, be separated from the other part. If the other part is not valid, it is not the fault of the referees, but is the effect of the conditions of the parties' bonds. The award as to the damages sued for in the action is a bar to the action.

The third objection to the judge's ruling is, that the award is void for uncertainty. We see no ground for this objection to any part of the award. Clearly there is no uncertainty respecting the plaintiff's claim for damages for an assault and battery, and for an obstruction of a right of way; and, as already stated, the award respecting those damages is a legal bar to this action.

The last objection which the plaintiff takes to the ruling is, that there was no ratification of the award. But the award being valid needed no ratification. In the case of *Culver* v. *Ashley*, 19 Pick. 300, cited by the plaintiff, the award was unauthorized, and took its effect solely from its adoption and performance by the parties. The above are all the objections submitted, by the plaintiff, to the ruling at the trial; and we have not looked for any other. *Exceptions overruled.*

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President, Directors and Company of the Conway Bank *vs.* American Express Company.

A bailee for hire cannot excuse himself for the want of reasonable care in the custody of property intrusted to him, simply by showing that the owner knew and acquiesced in the kind and degree of care which he exercised. And if the owner did not know all the circumstances affecting the risk to which the property was exposed, and especially if he had informed the bailee that the manner of keeping it was unsafe, the judge cannot rule, as matter of law, that the owner waived due care on the part of the bailee.

If a carrier who is in the habit of carrying large sums of money for hire, and keeping the same for several hours after its transportation, and until it is taken away by the owner, deposits money, which has been so carried, in a wooden desk, under lock and key, in his office, to which another person has access, and which is situated in a railroad station which is open to all comers, and then leaves the building for several hours in the middle of the day, with no person in charge of it, the judge cannot rule, as matter of law, in an action against the carrier for a loss of the money, that the evidence fails to show such want of care as to render him liable.

Contract to recover for a failure to deliver to the plaintiffs $2600 in bank bills, which the defendants had undertaken to forward from Boston and deliver to the plaintiffs at South Deerfield.

At the trial in the superior court, before *Rockwell*, J., it appeared that the defendants were an express company, having an office at South Deerfield, which is about six miles from Conway; that they were in the habit twice a week of carrying from Boston to South Deerfield the bank bills of the plaintiffs redeemed by them in Boston, and there delivering them to the plaintiffs' cashier, or his agent, Lemuel Cross, the stage-driver from South Deerfield to Conway; that there was no stipulation as to the time when the packages of bills should be delivered to Mr. Cross, but his custom was to call for them in the afternoon, when his stage left the station for Conway; that the defendants' agent, who was also the freight agent of the Connecticut River Railroad Company, was in the habit of placing these packages, when they were not delivered to the plaintiffs' cashier in the morning, in a wooden desk in the ticket office in the railroad station; that the door of the ticket office was always locked, except when occupied by this agent and another person, one

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Maynard, employed by the railroad company as his assistant, who were the only persons that had keys to the office; that the windows of the office were fastened by springs; that on the 27th of December 1862 a package of bills, containing $2600, arrived as usual at South Deerfield, at a little after nine in the forenoon; that it was locked up in the desk, as usual; that during the day the defendants' agent discovered that the desk had been forced open, and the money taken away; and that during that day the station had been left with no person in charge of it from half past ten in the forenoon till three in the afternoon. The plaintiffs introduced evidence tending to show that the money was stolen by Maynard.

It further appeared that the plaintiffs' cashier was well acquainted with the manner in which the packages of money were kept in the desk, but never objected thereto. The plaintiffs' president testified that on one occasion, in the latter part of 1859 or the early part of 1860, he inquired of the defendants' agent where the packages of money were kept, and, upon being informed, replied that it was unsafe, without the use of an iron safe; and the agent replied that, if the defendants could run the risk, he could; and no change was made in the manner of keeping the money. It also appeared that the amount of money which the plaintiffs annually received and transmitted through the defendants' express office was from $500,000 to $750,000. Two attempts had previously been made to break into the ticket office at night. It did not appear that the plaintiffs ever knew of these attempts, or that Maynard had a key to the ticket office. The defendants' agent testified that Maynard, who was not in the employment of the defendants, was hired by himself for the railroad company; that he had occupied his position for six months; that he supposed him to be honest, and had no reason to think otherwise, until the time when the money was stolen.

The above is substantially all the evidence that was offered in relation to the manner and place of keeping the money, and its loss; and the defendants asked the court to rule that there was not sufficient evidence of a want of care on the part of the defendants, in keeping this package, to render them liable for

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its loss; that if the defendants took the same care of this package that they did of other packages of money sent to the plaintiffs, and the plaintiffs knew of the degree of care exercised in keeping them, and had no reason to expect a different degree of care in this instance, and no objection to the place and manner of keeping them was made except that testified to by the plaintiffs' president, and the package was lost, the plaintiffs could not recover, even if the jury should find that ordinary care was not exercised; and that, if the jury were satisfied that Maynard forced open the desk and stole the package, the defendants were not liable. The judge declined so to rule, and instructed the jury that they need not consider the question of a waiver by the plaintiffs of the use of ordinary care by the defendants, or the question raised concerning Maynard; that, if the plaintiffs had satisfied them affirmatively that the defendants were not in the exercise of ordinary care, then the defendants were liable; but, if the defendants were in the exercise of ordinary care, they were not liable.

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

N. A. Leonard, for the defendants. The liability of the defendants, at the time the package in controversy was lost, was that of warehousemen, and not of common carriers. *Thomas* v. *Boston & Providence Railroad*, 10 Met. 472. *Norway Plains Company* v. *Boston & Maine Railroad*, 1 Gray, 263. The plaintiffs cannot recover for negligence which they had knowledge of and acquiesced in. *Knowles* v. *Atlantic & St. Lawrence Railroad*, 38 Maine, 55. *Wright* v. *Malden & Melrose Railroad*, 4 Allen, 283. *Hunt* v. *Lowell Gas Light Co.* 1 Allen, 343. *Holly* v. *Boston Gas Light Co.* 8 Gray, 123. *Horton* v. *Ipswich*, 12 Cush. 492. *Beers* v. *Housatonic Railroad*, 19 Conn. 566. The plaintiffs were guilty of negligence in not calling for the package before it was lost; especially when they knew that the defendants had no safer place to keep it in than the one used. The jury were left to establish an arbitrary rule of ordinary care, not depending on the particular circumstances of this case, and the knowledge and approval of the plaintiffs. Story on Bailm §§ 11--14.

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G. T. Davis, for the plaintiffs.

BIGELOW, C. J. We think this case was properly submitted to the jury to determine whether the defendants had exercised due care in the custody of the money which was intrusted to them. It does not seem to have been controverted at the trial that the defendants at the time the package was lost had ceased to have it in their keeping as common carriers, and that a correct rule was adopted by the court as to the standard of care by which the conduct and diligence of the defendants were to be measured. Certainly the instructions on this point were sufficiently favorable to the defendants. Ordinarily the duty of common carriers is to deliver articles at the place of destination to those persons for whom they are intended, and their responsibility as carriers does not cease until such delivery has been accomplished. But the contract of carriage may, in this respect, be essentially modified by express agreement; or by a usage or course of trade, by a particular mode of dealing between parties, by the well known and established practice of the carrier, and any other circumstances from which an intention of the parties can be clearly gathered to change the usual incidents of the contract, so as to put an end to the responsibility of the carrier as soon as the articles are transported by him to a particular terminus, and to substitute in its place the less stringent obligation of a depositary or custodian of property intrusted to him for safe keeping. *Gibson* v. *Culver*, 17 Wend. 305. *Farmers & Mechanics' Bank* v. *Champlain Transportation Co.* 16 Verm. 52; S. C. 18 Verm. 131, and 23 Verm. 186. *Thomas* v. *Boston & Providence Railroad*, 10 Met. 472. From the evidence reported in this case, the inference is certainly a reasonable and fair one, that it was understood between the parties that the office of the carrier should be the place where the delivery of the money to the agent of the plaintiffs was to be made, and that after it was deposited there the defendants were no longer to be insurers of the property against all risks but those arising from the act of God and public enemies, but that it was there to continue in their possession until taken away by the plaintiffs' agent, as bailees responsible only

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for due and reasonable care in its custody and safe keeping. Such being the theory on which the case was tried by both parties, we have only to consider whether there was any error made by the court in its application to the facts in proof. In this aspect, the objections urged by the defendants resolve themselves into two.

1. The first is, that the evidence shows that the plaintiffs knew the place where the money was deposited and the mode in which it was kept and secured by the defendants, and that the jury should have been instructed that no action would lie to recover damages for the alleged negligence, because the plaintiffs assented to and acquiesced in the degree and kind of care which was adopted by the defendants in the custody of the money. We are not prepared to adopt, as a rule of law applicable to the responsibility of parties, the doctrine for which the counsel for the defendants contends. Mere knowledge of the mode in which a depositary receives and takes care of property intrusted to him will not operate to absolve him from all liability to those who employ him with such knowledge, for a want of due care in the keeping of their property. Such knowledge, accompanied by evidence of long acquiescence without objection by an employer, might be evidence of an agreement as to the nature and degree of care which was to be used by the bailee. But beyond this, it would not be safe to go. A person might be willing to intrust his property to a carrier as warehouseman, intending to rely solely on his personal responsibility for its safety, irrespective of the particular mode adopted for its transportation and custody. Something more than silence and acquiescence would be necessary to absolve a party from the proper measure of responsibility which attaches to the business or calling which he assumes to carry on. Parties may change, modify or waive the legal incidents of a contract by agreement, express or clearly implied; but if there is no sufficient evidence of such agreement, the contract must take effect according to the rules of law applicable to it. Upon the statement of the evidence contained in these exceptions, it appears to us that it was wholly insufficient to warrant the instruction for which the

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defendants asked. It fell far short of proving any waiver by the plaintiffs of the use of due care by the defendants in the custody of the money. To give effect to such waiver, it would be necessary to show a full knowledge by the plaintiffs of all the material facts and circumstances in relation to the manner in which the money was kept, and the risks to which it was exposed. Of these, there were several of which it does not appear that the plaintiffs had any knowledge whatever; especially it does not appear that they knew that the building in which the money was kept was left for several hours each day without any person to take charge of it, although during this time it was open to all comers; or that a person not in the employment of the defendants had free access, by means of a duplicate key, to the office in which the desk containing the money was kept; or that previous attempts had been made to break into the building by robbers at night. But, in addition to this ignorance of essential facts, it affirmatively appears that the plaintiffs through their president had distinctly informed the agent of the defendants that the place in which the money was kept was unsafe. In this state of the proof, it is difficult to see any ground on which a jury would be warranted in finding either a waiver by the plaintiffs of due care and diligence on the part of the defendants in the custody of the money, or any assent to the manner in which it was actually kept during the time it remained in their possession.

2. The facts already adverted to are decisive of the other exception taken by the defendants, that the court erred in refusing to rule that the evidence was insufficient to show a want of due care, or such negligence as to render them liable in this action. It certainly cannot be said that there was not a scintilla of proof of an omission to use that prudence and discretion which were adapted to the business which they undertook to perform for an adequate compensation. *Exceptions overruled.*

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CHARLES B. STAFFORD *vs.* ISRAEL WHITCOMB & another.

A sale of mortgaged personal property by the mortgagor, with the oral consent of the mortgagee, will convey a good title to the purchaser, although the latter was not at the time informed of the existence of the mortgage.

TORT for the conversion of a horse.

At the trial in the superior court, before *Rockwell*, J., it appeared that Solomon Todd, the former owner of the horse, had mortgaged him to one of the defendants, and afterwards sold him to the plaintiff. There was no evidence of a written consent by the mortgagee to the sale, and the evidence was conflicting whether oral consent had been given, and whether the plaintiff at the time of his purchase was informed of the mortgage. The judge instructed the jury that the mortgagee could not set up a title to the horse under his mortgage, provided he had given oral permission to Todd to sell him, and that, if such permission was proved, it was immaterial whether or not the plaintiff was informed of the mortgage.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

S. O. Lamb, for the defendants, cited Gen. Sts. *c.* 161, § 62; *Wheeler* v. *Russell*, 17 Mass. 258; *Shearer* v. *Babson*, 1 Allen, 486.

W. Griswold, for the plaintiff.

DEWEY, J. The question in the present case is, whether, if the jury were satisfied that the mortgagee had given to the mortgagor verbal permission to sell the horse, the mortgagee would, by reason of such permission, be barred of his right to set up his mortgage against the title of the purchaser.

It is urged, on the part of the defendants, that the plaintiff is estopped from showing such verbal authority to sell the mortgaged property, a sale made under such verbal authority being an illegal act, and made punishable as such by Gen. Sts. *c.* 161, § 62. The error of the defendants is in overlooking the distinction between the present case and that class of cases where

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both parties participate in doing an illegal act. Such was the leading case of *Wheeler* v. *Russell*, 17 Mass. 258, where the defence was founded upon the statute making it a penal offence to purchase or sell shingles not duly surveyed. The same would be true of contracts made on Sunday, contracts for the sale of lottery tickets, and many similar cases where the contract is forbidden by statute. But this statute is of a different character. It is a statute for punishing criminal offences against property. The sections preceding § 62 show very clearly its character and purposes. Section 59 affixes a penalty to the act of selling land under an incumbrance, without notice to the purchaser; and § 60 for selling land known to be attached, without giving notice thereof. Section 62 is also intended to operate solely on the mortgagor who shall sell mortgaged property in violation of the provisions thereof. In case of a sale made by him, without the written assent of the mortgagee, the mortgagor is made liable to be punished. But the purchaser may be perfectly innocent in the matter. The statutes deal only with the mortgagor, or party who has made sale of property mortgaged or attached, in violation of the rights of others. But in these various cases the contract is available to the purchaser, to the extent of any interest he could acquire to property thus incumbered. That penal statutes of this character are not to affect innocent parties, who are not participators in the acts made punishable by statute, was shown in the cases of *Emery* v. *Kempton*, 2 Gray, 257; *Roys* v. *Johnson*, 7 Gray, 162.

The ruling was correct, and the exceptions must be overruled.

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Silas G. Hubbard *vs.* Jonathan Lyman.
Same *vs.* Lorenzo Brown.

An attachment upon a writ against an insolvent debtor, of property which belonged to him before his insolvency, will render the attaching creditor and others who take the property under the attachment liable, as for a conversion, to one who was in possession of it at the time of the attachment under a claim of title.

The statute provisions regulating the sale of mortgaged property by the mortgagor have no application to the case of a contract between the mortgagee and mortgagor, or between the assignee of one and the assignee of the other.

Two actions of tort, for the conversion of a quantity of tobacco.

The cases were tried together in the superior court, before *Rockwell*, J., and it appeared that the tobacco originally belonged to William Brown, who mortgaged it to Charles Hayward on the 30th of June 1862. Brown subsequently went into insolvency, and Henry Johnson was chosen assignee of his estate. There was a controversy between Hayward and Johnson as to the validity of the mortgage, and on the 10th of March 1863 Hayward, being in possession of the tobacco under his mortgage, sold it to the plaintiff for an agreed price, and delivered it to him at the depot of the Vermont and Massachusetts Railroad Company at Northfield. Only one dollar was then paid to Hayward, and there was some conflict of evidence as to the time when the payment was to be made. On the 12th of March, Johnson commenced an action against the plaintiff and Hayward for an alleged conversion of the tobacco, and attached the same upon the writ; and, on the 20th of March, executed to the plaintiff a bill of sale thereof, receiving from him the full value of the same, with the exception of the one dollar which the plaintiff had paid to Hayward to bind the bargain with him. Johnson also gave to the plaintiff an agreement to indemnify him against all claims which might be made by Hayward in relation to the tobacco, and discontinued his action. On the 26th of March, Johnson, in the plaintiff's absence and without his knowledge, fearing that Hayward might still claim

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the tobacco, and partly for the purpose of preventing him from regaining possession of it, took it from the possession of the plaintiff's agent at Northfield, and carried it to South Vernon in Vermont. Two days afterwards, Lyman, the defendant in the first action, went to South Vernon with an officer, who attached the tobacco on four writs against Brown, one of which was in Lyman's favor, and they removed it, and it was afterwards sold on two executions, which were obtained in said actions, and purchased by Lorenzo Brown, the defendant in the second action, who afterwards sold it to another person. It also appeared that, after the making of the above attachments, Lorenzo Brown, having a writ against William Brown, directed the officer to return thereon an attachment of said tobacco, which was accordingly done. The plaintiff gave Johnson authority to institute in his name any suits which it might become necessary to commence, on account of the tobacco; and it appeared that these actions were brought by Johnson's directions, and were carried on with the understanding that the expenses should be borne by him.

Upon these facts, the judge ruled that the plaintiff could not sustain his actions, and verdicts were accordingly returned fo the defendants; and the plaintiff alleged exceptions.

G. T. Davis & C. Allen, for the plaintiff.

D. Aiken & C. C. Conant, for the defendants.

Hoar, J. The plaintiff was in possession of the property when it was taken from him by the authority of the defendant; and he held it under a claim of title. He can maintain his action, therefore, unless the defendant can show a better title. The only title set up by the defendant is as a creditor of William Brown, under an attachment of the tobacco as Brown's property. But it is very clear that the property was not Brown's at the time of the attachment, because all his right in it had passed by the assignment in insolvency to his assignee. If the plaintiff's possession was not lawful, the assignee in insolvency was the only party entitled to call him to account. These considerations are decisive of the case; but if the plaintiff were required to prove a complete title in himself, it is not easy to

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see any defect in that which he has shown. He has the title of the mortgagee and of the assignee of the mortgagor. The statute provisions regulating the sale of mortgaged property by the mortgagor have obviously no application to the case of a contract between the mortgagee and mortgagor, or between the assignee of one and the assignee of the other.

Exceptions sustained.

Amos E. Reed *vs.* Inhabitants of Deerfield.

The court cannot take from the jury a case in which the evidence is conflicting, and the testimony of one or more witnesses, if believed, would, taken by itself, support a verdict.

This court cannot decide, on a bill of exceptions, that driving a safe horse, with a tight rein, at night, at his usual speed of ten miles an hour, by a skilful driver, over a wide and level road, with which he is familiar, and over which he has passed in safety within an hour without perceiving any obstruction, is such a want of ordinary care as to prevent a recovery for an injury sustained from a defective highway.

Gray, J. This is an action of tort to recover for injuries to the plaintiff's person, and to his mare, wagon and harness, occasioned by a defect in the highway leading from Deerfield to Greenfield. The existence of the defect and the defendants' liability to repair it are not denied, and the defence is rested upon the plaintiff's want of ordinary care.

The undisputed facts appearing at the trial were as follows: At the place of the accident the road-bed was twenty-five or thirty feet wide, and nearly level, so that travel usually passed over its whole extent, and there were ordinarily two, and sometimes three beaten paths. The day before the accident, the surveyor of highways had been repairing this way by placing earth on the centre and spreading it so as to round up the road. During the progress of the work, he had placed rails across each side of the way, with one end resting on the fence and the other on the ground within the road-bed, so as to turn the travel into the centre; and he left some of the rails in that position on the night of the accident. The plaintiff, with James Foster, who

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had been working for him all day, left his house in Greenfield after sunset, and drove to Deerfield, a distance of three miles; he took a glass of gin with Foster at Deerfield, left him there, and returned immediately over the same road, and on the way back drove his mare against one of the rails; and the wagon was thus upset and broken, and the plaintiff and his mare were injured. It was a dark night, and had become very dark before the accident. The natural gait of the plaintiff's mare was from seven to ten miles an hour. The evidence on both sides tended to show that the plaintiff was a competent and skilful driver, but was in the habit of driving very fast.

The plaintiff testified that it was an hour after sunset and quite dark when he and Foster started for Deerfield, and they were twenty minutes going over; that he was familiar with the road, and had travelled it very often; that he thought, as he went over, that there had been repairs on the road, and his wheels rolled hard, but his mare "went right along through," and he saw nothing of the rails; that on his return, about a dozen rods before reaching the place of the accident, he met a team; that his mare saw it, and turned to the right, and after passing it he drove to the left, on the south side of the road, as he always did, because he could see better on account of the trees; that he struck a rail and went over; that the mare was anxious to come home, and he was driving ten miles an hour, which was her usual rate; that he was holding her in hand, and driving with a tight rein, as he always did; that he spoke to the mare as he went over, and the next moment found himself on his belly in the road; that he had his reins twisted about his fingers, and, as the mare left the wagon, one of the fingers on his left hand was pulled out of joint and badly abraded; that this was the first he knew of the rails being there, and it was too dark to see them unless he was looking on purpose; that he was not consciously under the influence of liquor at the time of the accident; and that his mare could trot a mile in four minutes, but was safe and gentle, and had been driven by his wife and other women.

There was some evidence tending to corroborate the plaintiff's

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testimony; and also evidence contradicting it on all material points. But the question whether it was thus overthrown could not be raised upon the defendants' motion for an instruction to the jury that there was no evidence of due care upon the plaintiff's part which would warrant a verdict in his favor. It was not a question of the legal sufficiency of the whole evidence in the case, but of the weight of conflicting evidence. The line of distinction is well established, although it is sometimes difficult to determine upon which side of it a case falls. *Parks* v. *Ross*, 11 How. (U. S.) 373. *Schuchardt* v. *Allens*, 1 Wallace, 369–371. *Denny* v. *Williams*, 5 Allen, 4, 5. *Snow* v. *Housatonic Railroad*, *ante*, 448. Where the whole evidence introduced by the plaintiff, if believed by the jury, is so insufficient to support a verdict that the court would not permit one to stand, it is the duty of the court to instruct the jury, as matter of law, that there is not sufficient evidence to warrant a verdict for the plaintiff. But where the evidence is conflicting, and the testimony of one or more witnesses, if thought by the jury to be credible and accurate, would, taken by itself, support a verdict, the case cannot be taken from the jury; for the court cannot adjudge, as matter of law, that one witness, or set of witnesses, is to be believed, rather than another That question is not of law, but of fact, and can only be entertained upon a motion for a new trial on the ground that the verdict is against the weight of evidence; and in this case has been so heard and decided by the judge presiding in the superior court, and is not now before us.

The question remains whether the plaintiff's own testimony was sufficient evidence of ordinary care on his part to be submitted to the jury. Its sufficiency is objected to principally on two grounds; his previous knowledge that the road was undergoing repair, and the speed at which he was driving at the time of the accident. But the plaintiff expressly testified that he did not see the rails; and his knowledge of the state of the road was but one circumstance, to be weighed with the other evidence in the case by the jury, who might well conclude that knowledge that the town was repairing the centre,

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did not require a traveller to presume that it had unnecessarily barricaded the sides, of the highway. And the court cannot decide, as matter of law, that a skilful and careful driver, firmly holding the reins, and driving a safe horse at his usual speed at night over a wide and level country road, with which he is familiar, and over which he has passed within an hour in safety and without perceiving any obstruction, is conclusively shown to have been wanting in ordinary care, by the fact that this speed was ten miles an hour.

In the case most relied on by the defendants, the plaintiff's own testimony showed that the defect was manifest to every one and well known to him, and that he paid no attention to his driving; it did not even show that he was driving with a tight rein. *Gilman* v. *Deerfield*, 16 Gray, . These facts proved a want of ordinary care on his part, and distinguish that case from the present. *Exceptions overruled.*

J. Wells, for the defendants, cited *Winn* v. *Lowell*, 1 Allen, 177; *Smith* v. *Lowell*, 6 Allen, 39; *Holly* v. *Boston Gas Light Co.* 8 Gray, 123; *Spofford* v. *Harlow*, 3 Allen, 176; *Gilman* v. *Deerfield*, 16 Gray, .

P. C. Bacon, for the plaintiff.

EDWARD C. HOGAN *vs.* HENRY H. HARLEY.

If the defendant in a writ of forcible entry and detainer seeks to justify his possession under the authority of some other person than the plaintiff, the burden is on him to prove the title of such person.

FORCIBLE ENTRY AND DETAINER. At the trial in the superior court, before *Wilkinson*, J., it appeared that for several years prior to the death of the defendant's wife, in 1862, he had occupied the premises in her right. She left no issue. The plaintiff was her brother, and it was admitted that he was entitled to a share of the premises. He also testified that there had

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been another sister, who married one Sheldon, of Ohio, and had children, but he had not heard from them for fifteen years, and did not know whether they were living or not. There was evidence tending to show that, after the death of the defendant's wife, the defendant held the premises under the plaintiff, and was duly notified to quit the same. The defendant introduced evidence tending to prove that Mrs. Sheldon had died, and that at the time of the commencement of the action he held the premises under the authority of her heirs. The plaintiff's counsel contended that no such heirs existed, and that, if they did, the defendant had no authority to occupy the premises from them; and that the defendant was estopped from denying the plaintiff's title. The judge instructed the jury that if the plaintiff and defendant mutually agreed for an oral lease of the premises, so that the relation of landlord and tenant existed between them, the defendant was estopped to deny the plaintiff's title; and that, if the defendant undertook to justify his possession under authority of any other person than the plaintiff, the burden was on him to show the title of such person.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

G. T. Davis, for the defendant.

A. M. Copeland, for the plaintiff.

Dewey, J. The case presented upon the bill of exceptions is somewhat more limited than that assumed by the defendant at the hearing before this court. No question is now made as to the correctness of the ruling as to the estoppel, in case the defendant held the premises under a lease from the plaintiff.

The further instruction that, if the defendant undertook to justify his possession under the authority of any other person than the plaintiff, the burden was on him to show the title of such person, would be correct as an abstract proposition, and was unobjectionable as applied to the particular defence set up.

We do not perceive that any ruling was asked by the defendant upon the point now urged, namely, that the plaintiff was bound to show that he was the sole owner of the premises, to enable him to maintain the present action.

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Without expressing any opinion beyond that arising upon the questions raised by the exceptions, we think the exceptions taken are not sustained. *Exceptions overruled*

LEVI GAGE, JR. *vs.* ELISHA J. PITTS.

If the purchaser of land over which there is a right of way by prescription interrupts the way, and his grantor thereupon changes its course, with the intention of making it pass over his own adjoining land, but in fact makes it by mistake to pass over the granted premises, the right of way over the new route will continue, if accepted by those having the right of way, and assented to by the purchaser of the land, but not otherwise; and if the purchaser is under the same mistake as to the boundaries of his land, and supposes that the new route does not pass over the same, his silence will not justify the inference that he intends to permit the new route to pass over his land.

TORT to recover damages for breaking and entering the plaintiff's close, and breaking down a gate thereon. Answer, that the defendant had a right of way over the same, which was interrupted by the plaintiff, and that the acts of the defendant were in the lawful use of the way and removal of the obstructions.

At the trial in the superior court, before *Rockwell*, J., it appeared that there was a drive way from a public road northerly over three lots of the plaintiff, to the land above, upon which two gates were put by the plaintiff, one at the commencement of the drive way, at the public road, and the other upon the plaintiff's land above. The defendant introduced evidence tending to show a use, by the public and by himself, since 1822, of a way from the public road to land north of the plaintiff's premises; that in 1835 Mosely Clapp, who then owned the premises now owned by the plaintiff and also the adjoining land, conveyed the premises now owned by the plaintiff to B. F. Cheney, who shortly afterwards, in the same year, erected buildings which interrupted the way; that the land thus sold was unfenced; that in the autumn of 1835, complaint being

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made of the interruption of the way, Clapp, supposing that there was a right of way to pass from the land above to the highway, gave directions to have the course of the way changed, so as to pass round the corner of Cheney's land, and over his own land; that in acting upon these directions the course of the way was changed, but so as still to pass over a portion of Cheney's land; that Cheney made no objection when this change was made; that, after erecting his buildings, Cheney fenced his land, and occupied a portion of that over which the way is claimed, as a garden; and that the plaintiff purchased the same in 1849. There was evidence of more or less use of the way since 1835 by the defendant and others, and also of the character of such use; the plaintiff contending that it was not of such a character as to give a right. And there was evidence tending to show that it was made through wild land, for the use of persons going to mills at its northern end, and that it was over hills which were too steep for the use of carriages.

The plaintiff asked the court to instruct the jury, amongst other things, that no designation by Clapp of a new or substituted way upon land which he had before sold to Cheney could have any effect to create such substituted way; that there was no evidence to warrant the jury in finding that the part of the way at and immediately north of the upper gate had ever been substituted for the old way by any agreement mutually executed between parties competent to make such agreement and substitution; and that on the whole evidence the right of way claimed by the defendant had not been established. The judge declined so to rule, and instructed the jury, amongst other things, substantially as follows:

The defendant claims a right of way over the plaintiff's land on three grounds: 1. That there was a public road over the same; 2. That the public had acquired a right to pass there, by prescription and user; 3. That the defendant had acquired such right, by prescription and user. The first ground cannot be maintained, upon the evidence. The defendant may rest a legal defence upon his second ground, upon proper evidence, and this is a question of fact for the jury in the light of the following

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legal principles: If a road has been used by the public in a proper manner, for a sufficient time, the public may have acquired a right of way by prescription. To establish such a way, the defendant must prove actual public use, general, uninterrupted, under claim of right so to use it, and continued for a period of more than twenty years. Although the testimony may not be sufficient to show that the public had acquired a right to a full public highway, used by footmen, horsemen and carriages in all the modes in which highways may be used, and without any bars or gates, yet it may be sufficient to show a public right to pass over a road, worked for such purpose, on foot or on horseback, and driving cattle, and subject to the duty of taking down and putting up bars, or opening and shutting gates. This was the right which the defendant claimed; and if he shows an actual public use of a defined and beaten road, general, uninterrupted, under a claim of right on the part of the public so using it, and continued for more than twenty years, he, as one of the citizens, had a right thus to enforce his claim and exercise his right.

The defendant may justify, upon sufficient evidence, upon his third ground, in the light of the following principles of law: To establish a private right of way over the lands of another by prescription and user, the claimant must show, not merely that the way was enjoyed by him twenty years, but also that the enjoyment was continuous, uninterrupted, adverse, under a claim of right and with the knowledge and acquiescence of the owner of the land over which the alleged way passes, in the absence of any evidence of permission or license; and such facts, if proved, are sufficient to establish his right. If the jury are satisfied that the use, during the whole time, was under a claim of right, and that the owner of the land knew of such use and claim, it is sufficient, although the evidence may not show a claim in words on the part of the person using the way, or a declaration in words on the part of the owner of the land, of his knowledge and acquiescence in the use. To establish a right of way by prescription, the way must be shown to have been used substantially in the same place, and following its course

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substantially upon the same track. But if the owner of the land, recognizing the right, wishes to change the route in a particular point, he may do so upon his own land, to accommodate himself; and if the new piece of way is accepted by those having the right of way, and afterwards the way thus modified is used as the way was before, in the exercise of the same right, the right of way continues as before, and the right remains perfect as against the owner of the land and his grantees, in the modified route. In this case, evidence has been introduced tending to show that Mosely Clapp, who originally owned all the premises over which the alleged way passed and now passes, did make a slight alteration, and that the cause of the alteration was this: Clapp sold a piece of land to one Cheney, which cornered upon this way; finding the corner of the Cheney land extended upon the way, he changed the way a few feet, with the intent of carrying the whole way on to his own unsold land, and so leaving the Cheney land untouched by it. But the plaintiff contends upon the evidence, that, even if that was Clapp's purpose, he did not effect it, but that after the alteration some part of the way remained upon the corner of the Cheney lot, and that the upper gate, which was removed by the defendant, was upon that part, and that such alteration destroyed the right of way. The court rules that if Clapp made this alteration in good faith, supposing that the new location was on his own land, and the use of the way continued thereafter as before, these facts did not destroy the right of way, but the land of the plaintiff is now subject to the right of way in its present condition.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

G. T. Davis, (*S. O. Lamb* with him,) for the plaintiff, cited *Cook* v. *Babcock*, 11 Cush. 206; *Putnam* v. *Bowker*, Ib. 545, and cases there cited; *Larned* v. *Larned*, 11 Met. 423; Washburn on Easements, 129; 1 Greenl. Ev. §§ 197, 199.

W. Griswold, for the defendant. The rulings were correct, as to the evidence requisite to prove a right of way. Washburn on Easements, 72. *Blake* v. *Everett*, 1 Allen, 248. *Thomas* v.

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Marshfield, 13 Pick. 240. *Spear* v. *Bicknell*, 5 Mass. 130. The ruling as to the effect of the change of the course of the way in 1835 was sufficiently favorable to the plaintiff. Washburn on Easements, 107. *Darlington* v. *Painter*, 7 Penn. State R. 473. There was sufficient evidence of Cheney's assent to the change. There was also sufficient evidence to authorize the jury to find the acquisition of a right of way since 1835.

Bigelow, C. J. The instructions were correct on all points, except those given in relation to the alleged change of the course of a previously existing way by the substitution of a new route over a corner of the land which belonged to Cheney in 1835, and which is now owned by the plaintiff. There was a defect in the instructions on this point. The attention of the jury was not drawn to the important consideration, that such substitution could not be effectual without the assent, express or implied, of Cheney. Although it appears that Cheney made no objection to the location and substitution of the new route, yet it does not appear that he knew it passed over his land. Indeed, there is direct evidence that Clapp, his grantor, in locating it, intended that it should pass outside of the lot which he had conveyed to Cheney. In this belief, the latter might well keep silent. No inference can be drawn from his silence, that he intended to permit a new route to pass over any part of his land.

In this aspect of the evidence bearing on this part of the case, the jury should have been instructed that if they found that there was a previously existing way by prescription, as claimed by the defendant, and the course or route of such way was changed in the year 1835 so as to pass over a corner of Cheney's lot, such right of way would still continue over such new and substituted route, and be a valid, existing way, as against the plaintiff, if the change was known and assented to by Cheney, under whom, by mesne conveyances, the plaintiff holds his title; but that without such assent the way could not be claimed to exist over the plaintiff's land, unless it had been acquired by adverse use since 1835. Such an instruction was especially necessary, inasmuch as the plaintiff's counsel had requested the court to rule that "no designation by Clapp of a new or

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substituted way upon land which he had before sold to Cheney could have any effect to create such substituted way." Clearly it could not, unless with the assent, express or implied, of Cheney. *Exceptions sustained.*

ISAAC ABERCROMBIE *vs.* WILLIAM SHELDON & another.

A bond without surety, given by an executor and approved by the judge of probate, without notice to creditors, is not such a bond as the statutes of this commonwealth require and the statute of limitations against executors will not begin to run from the filing of such a bond.

In an action against an executor to recover a note of long standing, signed by his testator, payment of the note cannot be proved by evidence that it was the testator's habit to pay his debts promptly, or that another person had agreed to pay them for him, or that he made a list of his debts in which the note in question was not included.

CONTRACT against the executors of Seth Sheldon, upon a promissory note of $100, dated November 17th 1845, signed by him, attested by a witness, and payable to the plaintiff. The declaration alleged that Sheldon made the note in his lifetime, and that the defendants, as his executors, owe the plaintiff the amount thereof with interest. Writ dated January 24th 1864. The defence was payment and the statute of limitations.

At the trial in the superior court, before *Wilkinson*, J., it appeared that on the 5th of June 1860 the defendants were appointed executors and filed a bond without any surety, as stated in the opinion. The judge ruled that the action was not barred by the statute of limitations, and excluded certain evidence stated in the opinion, which was offered to prove payment. A verdict was accordingly returned for the plaintiff, and the defendants alleged exceptions.

W. Griswold, for the defendants. This bond was binding on the signers, though not executed in conformity to the statute; it was approved by the judge of probate; and was sufficient to allow the statute of limitations to begin to run. *Bank of Brighton* v. *Smith*, 5 Allen, 413. *Wendell* v. *Fleming*, 8 Gray,

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613. *Sweetser* v. *Hay*, 2 Gray, 49. *Baldwin* v. *Standish*, 7 Cush. 207. The bond should at least have this effect, unless it is made to appear that notice to creditors would have been of some advantage to them. The evidence which was excluded should have been admitted. 1 Greenl. Ev. §§ 108, 147, 153.

D. Aiken, for the plaintiff, cited Gen. Sts. *c.* 94, § 2; *c.* 97, § 5; *Emerson* v. *Thompson*, 16 Mass. 432; *Picquet, appellant*, 5 Pick. 76.

Hoar, J. This action is against executors upon a debt of their testator; and in defence to it they rely upon the limitation of actions against executors, contained in Gen. Sts. *c.* 97, § 5. In the first section of that chapter it is provided that "every executor and administrator, within three months after giving bond for the discharge of his trust, shall cause notice of his appointment" to be given in a manner therein prescribed. Section 5 is as follows: "No executor or administrator, after having given notice of his appointment, as provided in section one, shall be held to answer to the suit of any creditor of the deceased, unless it is commenced within two years from the time of his giving bond as aforesaid;" with exceptions which are not now material.

The provisions for the executor's bond are contained in Gen. Sts. *c.* 93. Section 2 requires that "every executor, before entering upon the execution of his trust, shall give bond with sufficient surety or sureties in such sum as the judge of probate shall order." By section 5 this requirement is so far limited that "an executor shall be exempt from giving a surety or sureties on his bond, when the testator has ordered or requested such exemption, or that no bond should be taken, or when all the persons interested in the estate, who are of full age and legal capacity, other than creditors, certify to the court their consent thereto; but not until all creditors of the estate, and the guardian of any minor interested therein, have been notified, and had opportunity to show cause against the same." The executors gave a bond, with a condition to pay all debts and legacies, but without any surety, which was approved by the judge of probate, upon the written consent of all the heirs and persons

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interested, except creditors. No notice that such a bond was offered was given to creditors, or ordered by the judge of probate.

It is evident upon this statement of the law and the facts, that the executors have never given the bond for the discharge of their trust, which the law required, and that the judge of probate had no authority to accept or approve the bond which was given. The judge probably proceeded upon the suggestion and belief that there were no creditors; but this proves to have been a mistaken assumption.

The question then is, whether the bond which was given can be regarded as a bond having such validity that the statute of limitations would begin to run from the time it was filed and approved. No adjudged case has been cited or found in which the question has heretofore arisen. In the case of *Picquet, appellant*, 5 Pick. 69, the giving of a bond with surety is spoken of by Chief Justice Parker as "a condition precedent to the power of administration;" and at the close of the opinion he says, that "probably the administration would be void if such bond were not given."

In *Baldwin* v. *Standish*, 7 Cush. 207, it was held that an executor's bond, approved by the judge of probate, in which the sureties were each bound in half the sum for which the principal was bound, was not void, but was binding on the obligors, and sufficient to give effect to the executor's appointment, and to render his acts as such valid, although this court would not sanction such a bond on appeal. But this was a bond with sureties, and came within the letter of the statute requirement, although irregular.

The case of *Bank of Brighton* v. *Smith*, 5 Allen, 413, was a suit by a bank on a bond given by their cashier for the faithful performance of his duties; executed by the cashier as principal, in the penal sum of $20,000, with ten sureties in the sum of $2000 each. The statute required a cashier, before entering on the duties of his office, to give a bond with sureties in a sum not less than $20,000. This court decided that the bond was not in conformity with the statute, but was valid as an

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independent contract; and it was also said that the statute was directory merely. But the point there decided, and the large class of cases in which it has been held that bonds not taken in compliance with the provisions of law may yet be obligatory as contracts between the parties, rest upon a very different principle from that which must determine the case at bar. Here the executors seek to claim an exemption from responsibility, depending upon a limitation which is to begin from the time of filing their official bond; and against a creditor, for whose security that bond was intended. He cannot be bound by the act of the judge of probate in accepting and approving the substituted bond, because he had no notice, and was not a party to the transaction.

Without deciding, therefore, that the appointment of the executors and their acts in the settlement of the estate are a nullity, or without legal force and effect in any other respect or in relation to any other parties in interest, we cannot avoid the conclusion that a creditor who has not had the notice which the statute expressly directs is not bound in any manner, nor his rights affected, by the giving of the bond without sureties. He may justly urge that the defendants have not given the bond for the discharge of their trust, which the law directs; and upon which the limitation of his right of action depends.

The rulings upon evidence at the trial seem to have been clearly right. Neither the habit of the testator to pay his debts promptly, nor his agreement with another person to pay them for him, nor his making a list of his debts in which that which the plaintiff alleges to be due was not included, has any legal tendency to prove that the plaintiff has been paid.

No question has been raised or considered as to the form of declaration. *Exceptions overruled.*

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HAMPSHIRE COUNTY.

Samuel Pinch *vs.* Edward Anthony & others.

If the owners of lands agree in writing, for a valuable consideration, to pay to another person a certain sum "out of the proceeds of the sale of said lands, if the same shall be sold, or, if the lands shall not be sold, and a company shall be formed for working the mines thereon," then to convey to him stock to that amount, "it being understood and agreed by and between the parties hereto that the foregoing amount, whether of cash or stock, is to be a charge on the joint estate" of the owners, a charge in the nature of a lien upon the lands is thereby created, which may be enforced in equity, upon a proper case being made, against all who take a title to the lands with notice.

Bill in equity, filed April 16th 1861, alleging that in 1849 the plaintiff was a skilful miner, employed at Crown Point, and was induced by persons who owned lands in Northampton, Southampton, Easthampton and Westhampton, to leave his employment for the purpose of conducting mining operations upon said lands; that those persons, after executing to the plaintiff a mortgage on the mineral rights in said lands to secure the sum of $1500, for his services and moneys agreed to be paid by him, conveyed the premises to Samuel Coit, who, in consideration of the plaintiff's skill and labor in conducting mining operations thereon, and of moneys advanced by him, executed to the plaintiff another mortgage on said mineral rights to secure the sum of $5000; that afterwards, in 1852, Edward Anthony purchased the premises in behalf of himself and other persons, who were made defendants, and received a deed thereof, and that, on the 27th of October 1853, said Anthony and the other persons in behalf of whom he acted, as parties of the first part, entered into the following agreement with the plaintiff, as the party of the second part:

"Whereas the parties of the first part are joint owners of certain mineral lands situated in Southampton, Easthampton and Westhampton, in Hampshire county, in the State of Massachusetts, and which said property is now standing in the name of Edward Anthony; and whereas it is proposed either to sell said mineral lands or to form a joint stock company for

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the purpose of working the mines on said lands; and whereas the parties of the first part have agreed, in consideration of the services rendered and to be rendered by the said Samuel Pinch, that he the said Samuel Pinch shall have an interest in the proceeds of the sale of said lands, if the same shall be sold, or, if a joint stock company shall be formed, then that he shall have a certain amount of the stock of the company; now, therefore, this agreement witnesseth, that the said parties of the first part, in consideration of the foregoing agreement, and in further consideration of one dollar to each of them in hand paid, the receipt whereof is hereby acknowledged, hereby agree to pay or cause to be paid to the said Samuel Pinch, his heirs or assigns, out of the proceeds of the sale of said lands, if the same shall be sold, the sum of $6500; or, if the said lands shall not be sold, and a company shall be formed for the purpose of working the mines thereon, then and in that case to convey or cause to be conveyed unto the said Samuel Pinch, his heirs or assigns, full paid up stock in said company, not liable to assessment, to the amount of $6500, at the par value of said stock; it being understood and agreed by and between the parties hereto that [of] the foregoing amount of $6500, the sum of $5000, whether of cash or stock, is to be a charge on the joint estate of the parties of the first part in proportion to their respective interests, and the remaining $1500 is to be a charge on the separate estate of Albert W. Wright. And the said Samuel Pinch on his part agrees, in consideration of the foregoing agreements, to remain and continue in the employ of the parties of the first part so long as they shall require his services, but not exceeding one year from the date hereof, for the same salary and compensation that has been heretofore paid to him, to wit, $100 per month, and the house and lands now occupied by him rent free; and if his services shall not be required for the full term of one year, he hereby agrees to leave the employ of the parties of the first part, and surrender the possession of the house and lands to them at any time, after receiving one month's notice from them."

The bill further alleged that the plaintiff entered the service

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of said Anthony and those for whom he acted, and continued therein so long as his services were required, and until the filing of this bill, although since 1854 the defendants have abandoned mining operations in said lands; and that he is entitled to maintain a charge and lien upon said lands for the sum of $6500, and interest from the date of the agreement, and to have the lands sold, and the proceeds applied in payment of his claim.

The plaintiff afterwards filed a supplemental bill, alleging that on the 26th of February 1863 the said Anthony, with a view to the formation of a joint stock company, conveyed the premises to Stephen Hill, Jr., who shortly thereafter conveyed the same to the "Manhan Silver Lead Mining Company," which the plaintiff believes to be a joint stock company; that since the conveyance to Hill, the plaintiff, at Hill's request, has devoted his attention to the development of said mines, and Hill has frequently assured the plaintiff that there should be a speedy and satisfactory settlement of his claim, but that such settlement has never been made. The plaintiff therefore prayed that said Hill and Manhan Silver Lead Mining Company might be made defendants, and that he might have such relief as he might be entitled to in equity.

The defendants filed a general demurrer, and the case was thereupon reserved for the determination of the whole court.

G. T. Davis, (*S. O. Lamb* with him,) for the defendants. 1. The plaintiff has a complete remedy at law. 2. The language of the agreement does not import the giving of a lien upon the real estate, or its proceeds. No interest in the premises was conveyed. It was merely an executory agreement, designating the fund out of which the plaintiff should be paid. *Rogers* v. *Hosack*, 18 Wend. 319. *Brainard* v. *Burton*, 5 Verm. 97. *Bonsey* v. *Amee*, 8 Pick. 236. *Webb* v. *Walker*, 7 Cush. 50. *Clarke* v. *Sibley*, 13 Met. 211. *Hunt* v. *Rousmanier*, 8 Wheat. 174. The bill alleges no unreasonable neglect, and no demand.

C. Delano, for the plaintiff, cited 1 Story on Eq. §§ 674, 677; 2 Ib. §§ 1207, 1215–1217; *Bradley* v. *Root*, 5 Paige, 632; *Silk* v. *Prime*, 1 Bro. C. C. 138, *n.*

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BIGELOW, C. J. The bill sets out a case which clearly entitles the plaintiff to equitable relief. The rule is perfectly well settled, that a party may by express agreement create a charge or claim in the nature of a lien on real as well as personal estate of which he is the owner or possessor, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons, who are either volunteers or who take the estate on which the lien is agreed to be given, with notice of the stipulation. Such an agreement raises a trust which binds the estate to which it relates; and all who take title thereto, with notice of such trust can be compelled in equity to fulfil it. *Legard* v. *Hodges*, 1 Ves. Jr. 477. *Roundell* v. *Breary*, 2 Vern. 482. *Power* v *Bailey*, 1 Ball & Beat. 49. *Gardner* v. *Townsend*, Coop. Eq Cas. 303. *Wellesley* v. *Wellesley*, 4 Myl. & Cr. 561. It is obvious that the law gives no remedy by which such a lien can be established, and the trust thereby created be declared and enforced. Equity furnishes the only means by which the property on which the charge is fastened can be reached and applied to the stipulated purpose.

On looking at the agreement set out in the bill, there is no room for doubt as to the intent of the parties to give to the plaintiff a claim on the lands therein described, as security for the money which they stipulated to pay to him. The agreement is not only that he shall have an interest in the proceeds of the sale of said lands, if the same should be sold, or a certain amount of stock in a joint stock company, if one should be formed, for the amount which they agreed to pay, but it is expressly stipulated that the amount due to him, "whether of cash or stock, is to be a charge on the joint estate of the parties, in proportion to their respective interests," to the extent of five thousand dollars, and the residue of the sum, being fifteen hundred dollars, "is to be a charge on the separate estate" of one of the parties. It is difficult to see how an intent to create a lien on the lands named could be more clearly expressed. The precise form in which the plaintiff may be entitled to relief cannot be determined, until the case is heard on its merits. The only order which we can now properly make is *Demurrer overruled.*

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John H. Nutting *vs.* Asa Dickinson.

An action may be maintained upon an oral promise to pay for land, at a certain sum by the acre, after the delivery and acceptance of a deed thereof.

If persons who are negotiating together for the purchase and sale of land orally agree to leave the price to be determined by arbitrators, who fix a sum in gross, and the parties afterwards agree to ascertain and abide by the estimate of the arbitrators by the acre, and a deed is accordingly executed, delivered and accepted, with the understanding by both parties that the price is to depend on the estimate of the arbitrators by the acre, and the purchaser pays a sum which he asserts is all that the land comes to, by the appraisement, but which the vendor says is not sufficient, the latter may maintain an action to recover such sum as shall be found, upon a measurement of the land, to be due by the appraisement.

Contract to recover $225 and interest, being the difference between the sum of $2175 paid by the defendant to the plaintiff upon the delivery of a deed of a farm, and the sum of $2400, at which the plaintiff alleged the land had been appraised by arbitrators. Answer, 1st, the statute of frauds; 2d, that the parties after the appraisement, and without reference to it, agreed for the sale and purchase of the farm at the price of $2175, which had been paid and received in full compensation and satisfaction.

At the trial in the superior court, before *Rockwell*, J., the plaintiff was a witness; and the material part of his testimony was as follows: In October 1862 the plaintiff and defendant agreed that the defendant should take the farm at the appraisement of three arbitrators mutually agreed upon, and went upon the land with them, and the arbitrators, after deliberation, appraised the farm at $2400, and so informed the parties. Before a deed was made, the defendant sent word to the plaintiff that he should not take it at that price, because there was not so much land as was appraised. They met, and the plaintiff told the defendant that he should have it at the appraisement, and, if it was appraised at so much by the acre, he should have it at that. The defendant said it was appraised by the acre. The plaintiff did not know it. The parties got a surveyor to survey the land, and after he had surveyed it, but before he had made

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his computations, the defendant said he would take it at the appraisement by the acre, and the parties went to one of the appraisers to find out whether it was appraised by the acre or not. The appraiser said they called the buildings $400, the home lot twelve acres at $100 an acre, and the rest of the farm one hundred acres at $8 an acre, making $2400 in all. On the computation of the surveyor it was ascertained that the home lot contained more than thirteen acres, and the rest of the farm somewhat more than ninety-one acres, and the price of the whole would a little exceed $2400, and the plaintiff in the defendant's absence directed the surveyor, for the purpose of satisfying the defendant and closing up the matter, to estimate the excess of the good land over twelve acres as part of the poorer land. According to this estimate, the price of the whole farm would be $2339, and this was named as the consideration in a deed drawn by the surveyor and executed by the plaintiff; but there never was any conversation between the plaintiff and the defendant about the sum named in the deed. The defendant went to the surveyor and got the deed, and afterwards came to the plaintiff's house, and paid him $2175, which he said was according to the appraisement. The plaintiff said it was not all that the farm came to by the appraisement. The defendant said it was. The plaintiff replied that it was not, and that he should attend to it after his family got well; and soon after wrote to the defendant, and received no answer; and the defendant afterwards refused to do anything more about it.

The judge, at the defendant's motion, ruled that upon this evidence the action could not be maintained, and directed a verdict for the defendant, which was returned accordingly. The plaintiff alleged exceptions.

S. T. Spaulding, for the plaintiff.

I. F. Conkey, for the defendant.

Gray, J. The plaintiff testified that after the farm had been appraised by arbitrators mutually chosen, and the defendant had once refused to pay the appraised value, and the parties had caused a survey to be made to ascertain the number of acres, but before the result of that survey was known, the defendant

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said he would take the farm at the appraisement; that the amount of the appraisement was ascertained by inquiry of one of the appraisers to have been $2400; and that the less sum of $2339, named as a consideration in the deed, was inserted by himself and the surveyor without any conversation with the defendant upon the subject.

The plaintiff's testimony, if believed by the jury, would well have warranted them in finding that the defendant agreed with the plaintiff to take the farm at the appraisement of $2400, and under that agreement accepted the deed; that the parties never afterwards agreed upon any different price; and that the sum of $2175 paid by the defendant was not accepted by the plaintiff as a satisfaction.

The plaintiff's agreement to convey the farm, if it had not been executed by the conveyance, would have been within the statute of frauds, and could not have been enforced against him. But the defendant's promise to pay the price of the farm conveyed to him is not within the statute. *Wilkinson* v. *Scott*, 17 Mass. 258. *Preble* v. *Baldwin*, 6 Cush. 552, and cases cited. The case should therefore have been submitted to the jury.

The plaintiff will consider whether it may not be well for him, before again proceeding to trial, to move in the superior court for leave to file an additional count to his declaration, in a form to sustain his action in case the jury should be of opinion that the minds of both parties did meet and agree on the price of $2339. *Exceptions sustained.*

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DANIEL R. CLARK & others *vs.* CHARLES B. KINGSLEY.

If labor is done in the erection of a building, under a contract with one who has contracted with the owner for the erection thereof, and no lien exists for such labor at the time when it is done, a subsequent rescinding of the contract will not give a lien therefor against the owner. But a lien may be enforced for labor done in the erection of the building by a person employed by such sub-contractor.

PETITION to enforce liens under the mechanics' lien law, brought by Daniel R. Clark, Jonathan P. Strong, John Brannan and Henry E. Crane.

At the trial in the superior court, before *Rockwell*, J., certain facts appeared in reference to the claim of Clark, which are stated in the opinion. The claim of Strong and Brannan was for labor done by them under Clark's orders, and under verbal contracts with him, by which they worked upon the building referred to in the opinion, from day to day. No question arose as to the claim of Crane.

The judge ruled that the petition could not be sustained in favor of any of the petitioners; and they alleged exceptions.

W. Allen, Jr., for the petitioners.

S. T. Spaulding, for the respondent.

HOAR, J. It appears from the bill of exceptions that one Chapin had contracted with the defendant to build him a house; and that the petitioner Clark made a written contract with Chapin to do the mason work and furnish the materials, for the sum of $1000, to be paid as follows: $250 on the 10th of October 1863, and the remainder when the work was finished. Materials were accordingly furnished and work done by Clark in the execution of his contract until about the 17th of October, when Chapin became insolvent, and the contract with Clark was by mutual consent given up. This was done with the knowledge and consent of the defendant. Chapin had previously paid Clark $200 of the $250, which Clark offered to prove had been made payable before the work was done to enable him to pay for his materials, and which he had actually applied in payment for the materials used, to the extent of their cost.

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The ground of Clark's claim, then, is this: that, by the rescinding of the contract with Chapin, he became entitled to recover the reasonable value of the work and materials which he had previously furnished; and having been fully paid for the materials, that he became entitled to a lien for the value of his labor. And his counsel have ingeniously argued that, when the contract was rescinded by mutual consent, the relation of the parties became such as it would have been if no express contract had ever been made, so that, in contemplation of law, the labor had been performed under an implied contract for payment upon a *quantum meruit*.

But the considerations which lead to an opposite conclusion are decisive. In the first place, the entire contract by Chapin to pay a fixed sum for the whole of the work and materials was not varied by the evidence offered of the motive which induced the provision that one instalment of the price should be paid before the work was finished. It did not show an agreement that one sum was to be allowed for materials, and another for labor. Clark was not bound to apply the $200 paid to him in the manner in which he did. The contract, therefore, being for an entire sum for labor and materials, and there being no lien for the materials, because the notice required by Gen. Sts. *c.* 150, § 2, was not given, no lien was created for the labor at the time it was performed. *Morrison* v. *Minot*, 5 Allen, 403. *Rathbun* v. *Hayford*, Ib. 406.

In the next place, it is important to observe that there was no contract for the labor and materials which Clark furnished, made by the respondent, or by any one on his behalf. Neither while the contract was in force, nor when it was rescinded, did the respondent incur any personal liability to Clark. The respondent had a right, by the provisions of Gen. Sts. *c.* 150, § 4, to prevent the attaching of any lien for labor not at the time performed, by giving notice in writing that he would not be responsible. As, until Chapin became insolvent, Clark furnished the labor under circumstances which created no lien, the respondent had no occasion to exercise this right. But if, by a rescission of the contract with Chapin, Clark could becom-

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entitled to a lien for labor previously performed, the respondent would lose the whole benefit of that provision. It is hardly a sound answer to this suggestion to say, that the contract was rescinded with the respondent's knowledge and consent. He was not a party to the contract, and could not object to any alteration in it which the parties to it chose to make. There was no agreement by him that there should be a lien. Indeed, the creation of a lien does not require the affirmative consent of the owner of the building to which it attaches. If he has authorized the employment of the laborer, the lien attaches by operation of law, unless he takes the measures necessary to prevent it. But we cannot suppose it is the intent of the statute that, when the work has been done without the existence of any lien, one should subsequently be created for that work by a new agreement of other parties, over whose acts the owner of the building has no control. The court are therefore of opinion that the petition of Clark cannot be maintained.

The claim of the petitioners Strong and Brannan stands on wholly different ground. They worked on the building, by the consent of the respondent, and furnished no materials. They had therefore a lien for the value of their labor. Gen. Sts. *c.* 150, § 1. *Parker* v. *Bell*, 7 Gray, 431. *Whitford* v. *Newell*, 2 Allen, 424. As to them the exceptions are sustained.

COMMONWEALTH *vs.* LORENZO D. MERRILL.

If the defendant in an indictment pleads a former conviction, and also that he is not guilty, he cannot be put to trial, against his objection, upon the last plea, until the first has been decided against him; and if he is put to trial upon both pleas at once, and is found guilty, under a ruling of the judge that the evidence produced by him does not sustain the plea of former conviction, he will be entitled to a new trial, although the evidence did not sustain his plea of former conviction.

Two indictments, the first of which was for being a common seller of intoxicating liquors from the 1st of March 1863 to the

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time of finding the indictment, in June 1864, and the second of which was for keeping a tenement, during the same time, used for the illegal sale and illegal keeping of intoxicating liquors. To each indictment the defendant pleaded a former conviction, and that he was not guilty.

When each case was called for trial, in the superior court, before *Rockwell*, J., the defendant objected that the district attorney had filed no replication or demurrer to the plea, and that there was no issue to be tried; but the judge overruled the objection, and required the defendant to produce evidence in support of his plea. The defendant thereupon offered in evidence, in the first case, a copy of a complaint, warrant and record of conviction against himself, for being a common seller of intoxicating liquors from the 1st of March to the 26th of April 1864; and, in the second case, a copy of a complaint against himself for keeping a tenement, from the 1st of March to the 25th of April 1864, used for the illegal sale and keeping of intoxicating liquors, upon which he was bound over with sureties for his appearance at the next term of the superior court. The judge in each case ruled that the special plea was not sustained, and ordered the trial to proceed upon the plea of not guilty; and the defendant, being convicted, alleged exceptions.

W. Allen, Jr., for the defendant.

Foster, A. G., for the Commonwealth.

Metcalf, J. There was a mistrial in both these cases, and the exceptions in both are to be sustained. The defendant filed, in both, a plea of former conviction, in the short form authorized by *St.* 1864, *c.* 250, § 4, and also a plea of not guilty. This last plea was an unnecessary and unusual addition to the first; *Commonwealth* v. *Goddard*, 13 Mass. 455; and he ought not to have been tried on it before the first had been regularly put in issue and decided against him. And such is also the law when former acquittal is pleaded. The two issues of former conviction or former acquittal and not guilty are distinct, and both cannot rightly be submitted to a jury at the same time. "Charging them with both issues at once," said the English

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judges, "would lead to this absurdity, that they would be obliged to find upon both; and yet if the first finding was for the prisoner, they could not go to the second, because that finding would be a bar." *The King* v. *Roche*, 1 Leach, (4th ed.) 135. Former acquittal or conviction must be specially pleaded, and is not admissible under the general issue of not guilty. Archb. Crim. Pl. (13th ed.) 117, *& seq.* *State* v. *Barnes*, 32 Maine, 534. And issue should be taken on such plea, either in law or to the country, and be regularly tried by the court or by the jury, and the decision thereon be made a matter of record. And such has been the practice in this commonwealth. See 13 Mass. 245, 455; 11 Pick. 134; 12 Pick. 496; 17 Pick. 395; 12 Met. 387; 8 Gray, 470. It is said, however, that evidence of such conviction has, of late years, been received on the trial of the general issue, upon the defendant's motion, and by consent of the Commonwealth's counsel; and we find that this seems to have been so in *Commonwealth* v. *Loud*, 3 Met. 328, and *Commonwealth* v. *Bubser*, 14 Gray, 83. We presume that this practice was resorted to for the purpose of saving the labor of counsel in preparing the proper pleadings. And if this course was permitted by the court, the parties who agreed to it were bound by the result. As the *St.* of 1864, *c.* 250, authorizes a plea that requires no labor, we trust that this practice will be discontinued.

This defendant was called to trial before the jury on the indictments and his two pleas thereto, and was required, against his objection, to give evidence in support of his special plea, though there was no issue thereon; and the judge, on hearing that evidence, ruled that it did not support the plea, and thereupon ordered that the trial proceed on the plea of not guilty. The judge treated the special plea as if it were before him on demurrer and joinder.

The argument for the Commonwealth is, that the defendant has not been injured, inasmuch as neither of the records, which he produced and offered in proof of his special pleas, showed a former conviction of the same offence for which he was then on trial; it having been decided that the charge of being a

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common seller of intoxicating liquors, during a specified time, and the charge of keeping and maintaining a tenement for the illegal sale or illegal keeping of such liquors, during the same time, are not the same, and that a party is punishable for each. *Commonwealth* v. *Bubser*, 14 Gray, 83. *Commonwealth* v. *Cutler*, decided in 1864, and not yet reported. But the defendant had a right to a trial of his special pleas according to legal rules, and, as he did not waive that right, a majority of the court are of opinion that he has suffered a legal injury by being deprived of such trial. The objection is not that the judge made a wrong decision as to the sufficiency of the plea in bar, but that he had no authority to make any.

In England a prisoner may be allowed to plead former acquittal or conviction *ore tenus*. But his plea is recorded by the clerk of arraigns, who replies thereto in behalf of the crown. It is therefore tried on an issue. *The King* v. *Coogan*, 1 Leach, (4th ed.) 448. *Champneys' Case*, 2 Lewin C. C. 53, 54. *Rex* v. *Bowman* C. & P. 339.

Exceptions sustained, and new trials granted.

COMMONWEALTH *vs.* TERENCE O'DONNELL.

A license granted under St. of U. S. of 1862, *c.* 119, does not authorize the sale of intoxicating liquors in this commonwealth, in violation of the statutes of this commonwealth, although such sale is only incidental to the seller's main business.

Keeping a tenement used for the illegal sale and illegal keeping of intoxicating liquors, and being a common seller of intoxicating liquors during the same time and at the same place, are distinct offences, and a conviction for one is no bar to an indictment for the other, although the same acts are relied upon in proof of both charges.

INDICTMENT for being a common seller of intoxicating liquors.

At the trial in the superior court, before *Rockwell*, J., the defendant offered to prove a license under the St. of U. S. of 1862, *c.* 119, authorizing him to sell liquors by retail during the time covered by the indictment; and, there being evidence that

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confectionery, tobacco and other articles were kept for sale at the defendant's place of business, he asked the court to rule that if the jury should find that the sale of those articles was his main business, and the sales of liquor testified of were only incidental to or growing out of his legitimate business, and did not of themselves amount to a business, trade or occupation, in the general understanding of those words, his license would be a protection to him. The judge declined so to rule.

The jury returned a verdict of guilty; and afterwards, before sentence, another verdict of guilty was rendered against him upon an indictment for keeping a tenement used for the illegal sale and illegal keeping of intoxicating liquors during the same time and at the same place alleged in this indictment, and the same acts were relied upon to sustain both indictments. The defendant objected to sentence being pronounced upon him upon this indictment, but the judge overruled the objection.

At the trial of the *second* indictment, for keeping a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the defendant contended that the conviction upon the first indictment, under the circumstances above stated, was a bar to the second; but the judge ruled otherwise.

The defendant alleged exceptions.

W. Allen, Jr., for the defendant.

Foster, A. G., for the Commonwealth.

METCALF, J. It was decided in *Commonwealth* v. *Thorniley*, 6 Allen, 445, that a license under the United States St. of 1862, *c.* 119, does not authorize sales of intoxicating liquor, which are (in the words of that statute) "in violation of the laws of any state or territory;" and as the selling of such liquor, though not the seller's main business, but only incidental to his lawful main business, is as much a violation of our state laws, when it is not thereby authorized, as any other unauthorized selling thereof, there is no plausible pretence for holding that such selling is protected by such license.

The questions raised by the other exceptions in these cases are settled by authority. In *Commonwealth* v. *Bubser*, 14 Gray, 83, and *Commonwealth* v. *Cutler*, decided in 1864, and not yet

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reported, it was adjudged that neither an acquittal nor a conviction of the charge of keeping a tenement for the unlawful sale of intoxicating liquor is a bar to an indictment for being a common seller of such liquor during the same time and at the same place. It follows that an acquittal or conviction of the charge of being a common seller of such liquor is not a bar to an indictment for keeping a tenement, during the same time and at the same place, for the unlawful sale of such liquor. The reason is precisely the same in both cases, to wit, that the two offences are not the same, but different, and that each is separately punishable. *Exceptions overruled.*

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF HAMPDEN, SEPTEMBER TERM 1864, AT SPRINGFIELD.

PRESENT:

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY, }
HON. THERON METCALF, } JUSTICES.
HON. EBENEZER R. HOAR, }
HON. HORACE GRAY, JR., }

INHABITANTS OF MONSON *vs.* INHABITANTS OF PALMER.

If a person whose settlement is in dispute is proved to have removed from one town to another, a new trial will not be granted on account of the admission of evidence, for the purpose of proving his domicil in the latter town, that he came to the latter town and said that he had sold out at the former town, and had come down and wanted to go to work; provided no special request was made for an instruction to the jury that his declaration was not of itself competent evidence of the fact of his selling out in the former town.

If the parents of illegitimate children intermarry, and the father acknowledges them as his, the children are, by *St.* 1853, *c.* 253, made legitimate to all intents and purposes, and thereupon take the settlement of the father.

CONTRACT to recover for the support, as paupers, of Julia Ann Calkins and her seven children. The case was tried in the superior court, before *Vose*, J., and reported for the determination of this court, upon facts which are stated in the opinion.

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J. Wells, (*H. Morris* with him,) for the plaintiffs.

P. C. Bacon, (*J. G. Allen* with him,) for the defendants.

Hoar, J. The jury have found specially that William B. Calkins, the husband and father of the paupers for whose support the action is brought, had his residence in Palmer for more than ten years consecutively; and it is conceded that he was then over twenty-one years of age, and paid all taxes assessed upon him for five of those years. His settlement in Palmer is therefore established, if this finding can be supported; and it becomes unnecessary to consider the correctness of the rulings upon another part of the case, in which the plaintiffs undertook to show that he also had gained a settlement in another mode.

The objection which is made to the verdict by the defendants is founded upon the admission of the testimony of the father of Calkins, that his son "came back to Palmer in September 1834, and said he had sold out at Becket, and had come down, and wanted to go to work." This evidence was offered to show the intention of the son at the time to change his residence from Becket to Palmer; and upon this intention that part of the case turned.

It has been settled by a series of cases in this commonwealth that, as a question of domicil usually involves not only actual residence, but the intention and purpose with which such residence is accompanied, it is competent to give in evidence declarations of intention, accompanying the acts of the person whose domicil is to be proved. *Thorndike* v. *Boston*, 1 Met. 242. *Kilburn* v. *Bennett*, 3 Met. 199. *Cole* v. *Cheshire*, 1 Gray, 441. If what Calkins said, therefore, is to be fairly construed as expressive of his intention in leaving Becket, or coming to Palmer, or of his purpose to regard one or the other as his fixed place of residence, and it was a declaration accompanying an act which it explained or qualified, there can be no doubt that it was competent evidence. It is urged by the counsel for the defendants that it is a mere narrative of a past transaction which it would not be admissible to prove by such a declaration; that the time when Calkins sold out at Becket, if at all, was not proved in any other way, and would have, if fixed, an important

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influence on the minds of the jury; that it is not admissible to prove facts by mere declarations, and then draw an inference of intention from the facts thus proved; but you must prove the facts otherwise, and may then give a character to those facts by the declarations of intention which accompanied them. And it is certainly true that the declaration of Calkins did not lawfully prove or tend to prove the fact which it recited, and that it would have been proper so to instruct the jury, if instructions had been asked. But we think the objection is not stronger than in many cases where evidence is admitted which is competent for one purpose, and not for another; and yet has some tendency to affect the minds of the jury in relation to matters in proof of which it is not admissible. The practical inconvenience is merely incidental, and seems to be inevitable. The fact was proved that Calkins had come from Becket, and was then at Palmer. In connection with this fact his declaration was made. And the court are of opinion that, though not very strong or decisive evidence, it was competent for the consideration of the jury, and that it was within their province to determine its meaning. It had some tendency to show that he wished it to be understood that he had done with Becket, and had come to establish himself at Palmer.

The decision of this question of evidence is sufficient to enable the plaintiffs to retain their verdict, which was for nominal damages only, to be amended hereafter according to the agreement of the parties, by the report of an assessor. But the more difficult question remains, and will present itself on the assessment of damages. That question is, whether children who were illegitimate at the time of their birth, but whose parents afterward intermarry, and their father acknowledges them as his children, acquire thereby the settlement of the father? It appears by the report that four of the children of Calkins, for whose support as paupers the plaintiffs claim compensation, were born between 1849 and 1856; that Calkins had at that time a lawful wife living, from whom he was divorced in 1856; and that he then married the mother of the children, and acknowledged them as his own.

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At the time of their birth, these children were illegitimate, and therefore had the settlement which their mother then had, which it is not contended was in Palmer. *St.* 1793, *c.* 34, § 2. *Boylston* v. *Princeton*, 13 Mass. 381. Rev. Sts. *c.* 45, § 1. This was the rule expressly established by the statute of 1793; and it has been held that the law was the same as to illegitimate children born before the statute of 1789. *Blackstone* v. *Seekonk*, 8 Cush. 75, and cases there cited. By *St.* 1789, *c.* 14, § 3, illegitimate children took and followed the settlement of their mother until they should gain one of their own. *Petersham* v. *Dana*, 12 Mass. 429.

The first provision for inheritance by illegitimate children was made by *St.* 1828, *c.* 139, as follows: "Every illegitimate child shall be considered an heir at law of its mother, and inherit as such when she shall die intestate." *Cooley* v. *Dewey*, 4 Pick. 93. The same statute provided that the mother should in like manner inherit from the child. This statute applied exclusively to intestate estates; and was substantially reënacted by Rev. Sts. *c.* 61, § 2, with an express limitation against any claim by right of representation. This limitation was afterward modified by *St.* 1851, *c.* 211, so as to allow an illegitimate child to inherit from any maternal ancestor. But it was held in *Kent* v. *Barker*, 2 Gray, 535, that, in regard to testate estates, illegitimate children were not to be regarded as children in the construction of statutes. In the opinion given by Thomas, J., however, it is expressly noticed that the decision does not affect the case of an illegitimate child, when the parents marry after its birth, and the father after the marriage acknowledges the child.

A particular provision for the case last named was originally made by *St.* 1832, *c.* 147, entitled "An act in further addition to an act regulating the descent and distribution of intestate estates." If the parents had other children born after the marriage, the children were made to inherit from each other, and the mother from the children, as if all had been born in lawful wedlock. The commissioners appointed to revise the statutes reported this enactment as a section in the chapter entitled "Of

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title to real property by descent," and without essential modification, except allowing the father as well as the mother to inherit from the children. In a note, they called the attention of the legislature to the fact that the statute was inoperative, unless there were other children born after the marriage; but said that they had no means of conjecture whether this was accidental or designed, as they knew not the reasons on which the statute itself was founded, "it being an innovation upon the law as immemorially practised, and transmitted to us by our ancestors;" and left it "to the wisdom of the legislature, if they should see fit to continue this law in force, to modify it in such manner as should be thought proper." The legislature did not adopt the obvious tendency of these suggestions; but, on the contrary, extended the operation of the section as reported by the commissioners, and enacted it in these terms: "When, after the birth of an illegitimate child, his parents shall intermarry, and his father shall, after the marriage, acknowledge him as his child, such child shall be considered as legitimate to all intents and purposes, except that he shall not be allowed to claim, as representing either of his parents, any part of the estate of any of their kindred, either lineal or collateral. Rev Sts. *c.* 61, § 4. So far the subject was treated only in connection with the descent of property.

But *St.* 1853, *c.* 253, was entitled simply "An act concerning illegitimate children whose parents intermarry;" and it enacts that, "when, after the birth of an illegitimate child, his parents have intermarried or shall intermarry, and his father has acknowledged, or shall, after the marriage, acknowledge him as his child, such child shall be considered legitimate to all intents and purposes." By the second section, "the fourth section of the sixty-first chapter of the Revised Statutes, and all acts inconsistent herewith, are hereby repealed." This statute is substantially retained in the General Statutes, with the omission of the words "to all intents and purposes;" and is found in § 4 of *c.* 91, "of title to real property by descent;" but there is no intimation from the commissioners who revised the statutes that any change in the law was intended.

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The case at bar is governed by the statute of 1853. Its terms are as broad and general as the language affords. And we do not think there is such evidence that the intention of the legislature was to confine their application to the single subject of the descent of property, as will authorize this court to interpret it in any narrower sense by implication, than that which the import of the language used naturally suggests.

In considering the probable reasons which led to the passage of the law, it is to be noticed that the consanguinity is established, for all purposes of lineal or collateral transmission of property, by evidence which the law deems conclusive. It cannot be supposed that the right of the father to the obedience and services of the child, and the corresponding obligation of protection and support, were not designed. The parents having remedied the wrong occasioned by their illegal and immoral conduct, to the extent of their power, by the marriage, it may well be supposed that the legislature intended to remove the stigma which had attached to the innocent offspring. We can see no reason, on the contrary, why children taken to be legitimate for all other purposes should not have the settlement of their father. That they should have it is consistent with the letter of the law in every particular; and, while the pauper laws are a system of fixed rules which are to be steadily applied without much latitude of construction, yet if we look into the general objects and purposes for which they are framed, it is equally consistent with these.

It is no sufficient objection that this construction may change the settlement of children, already acquired. That consequence has not unfrequently happened, under the operation of causes over which towns have no control. Under the *St.* of 1789, the marriage of the mother would of itself have changed the settlement of her illegitimate children. Under *St.* 1793, legitimate children, having the settlement of their mother, followed the settlement which she acquired by another marriage. *Plymouth* v. *Freetown*, 1 Pick. 197. The whole subject is very clearly and fully discussed by Mr. Justice Metcalf, in discussing the somewhat analogous case of a legislative enactment limiting

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the evidence admissible to show the invalidity of a marriage, in the recent case of *Goshen* v. *Richmond*, 4 Allen, 458; and cases are there cited from Maine and Connecticut, in which it has been held that an act of the legislature, sanctioning an informal marriage, was valid; and that the settlement of the children of the marriage, already born, would be thereby transferred, under the operation of the pauper laws, to the town of the father's settlement. *Lewiston* v. *North Yarmouth*, 5 Greenl. 66. *Goshen* v. *Stonington*, 4 Conn. 209.

Except so far as the change of settlement is concerned, there is no retroactive effect of the statute of 1853 which bears upon the parties to this suit. The supplies were not furnished by the plaintiffs till after the legitimacy of the children had been established.

We have examined carefully the statutes in relation to the support of poor persons by their kindred; Gen. Sts. *c.* 70, § 4; and to the adoption of children; Gen. Sts. *c.* 110; but do not find in them anything which tends to vary the conclusion to which we have arrived.

The result is that there must be a judgment for the plaintiffs for such sum as an assessor shall find is due to them for relief furnished to the wife and all of the seven children of Calkins.

Lucia E. Strong *vs.* Hiram Converse.

If land is conveyed by a deed of warranty, subject to a mortgage, the grantee does not thereby undertake nor become bound to pay off the mortgage; and if he does so, and takes an assignment thereof to himself, the mortgage is not thereby discharged, nor can the widow of the grantor maintain a writ of dower against him.

Writ of dower, brought by the widow of Chester Strong.

At the trial in the superior court, it appeared that in June 1849 Cyrus Knox and wife were seised in fee of the premises, and on that day conveyed the same to Harvey Strong and

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Chester Strong, as tenants in common, who at the same time mortgaged the premises to Knox and wife to secure the sum of $700, with interest, that being the whole consideration of the purchase. In September 1853 Harvey Strong and Chester Strong conveyed the premises to the tenant, by deed of warranty, subject to the said mortgage. The demandant did not sign either of said deeds. In September 1857 the tenant recovered judgment against Harvey and Chester Strong for possession of the premises, and in November 1857 was put in possession thereof, and has since remained in peaceable possession. In January 1859 the tenant purchased the mortgage to Knox and wife, and took an assignment thereof to himself, paying therefor the full amount of the original note and interest from its date, nothing having ever been paid thereon. The demandant's husband died in February 1863, and in May of that year she demanded her dower.

Upon these facts, judgment was rendered for the tenant, and the demandant appealed to this court.

J. Wells, (*J. G. Allen* with him,) for the demandant. The tenant having taken a deed of warranty subject to the mortgage, was bound to pay the mortgage debt. Having paid it, he has no right to set it up as an outstanding, unsatisfied claim. *Wedge* v. *Moore*, 6 Cush. 10. *Brown* v. *Lapham*, 3 Cush. 551, and cases there cited. *Wade* v. *Howard*, 6 Pick. 492. *Bolton* v. *Ballard*, 13 Mass. 227. The assignment will therefore have the effect to extinguish the mortgage, and leave the demandant entitled to dower, free from incumbrance. *Snow* v. *Stevens*, 15 Mass. 278. *Popkin* v. *Bumstead*, 8 Mass. 491. Being entitled to dower, the demandant may have it set out to her on this writ, under Gen. Sts. *c.* 90, § 2. *Newton* v. *Cook*, 4 Gray, 46. *Pynchon* v. *Lester*, 6 Gray, 314.

C. A. Winchester, (*H. Morris* with him,) for the tenant, in addition to cases cited by the demandant, cited *Webster* v. *Campbell*, 1 Allen, 313; *Henry's Case*, 4 Cush. 257; *McCabe* v. *Bellows*, 7 Gray, 148; *Evans* v. *Kimball*, 1 Allen, 240; *New England Jewelry Co.* v. *Merriam*, 2 Allen, 390.

Dewey, J. The estate passed to Knox and wife by the

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mortgage deed of Harvey Strong and Chester Strong, free from any claim to a right of dower in the demandant, so long as that mortgage remained undischarged. If that title still exists, and is now legally held by the tenant, it constitutes a good defence to the present action.

The fact that the tenant became the owner of the equity of redemption would not in itself defeat the right to hold the mortgage title free from the claim of dower. The fact that he purchased the equity of the mortgagor, taking a conveyance by a warranty deed, "subject to the mortgage," would not affect his right to hold the mortgage as assignee by an after acquired title, with all the rights of the original mortgagee. A purchase of an equity of redemption is always a purchase of an estate subject to a mortgage. But the taking of a deed with the recital that the premises are subject to a mortgage does not import a promise on the part of the grantee to pay such mortgage.

The further inquiry is, whether this mortgage has been paid and discharged. It is said, on the part of the demandant, that such was the effect of the acts of the tenant in January 1859, when, according to the statement of facts, the tenant purchased the mortgage to Knox and wife, and took an assignment thereof to himself, paying therefor the full amount of the original note, and interest from its date, nothing having ever been paid thereon. Upon a careful revision of the cases to which we have been referred by the counsel for the demandant, we think they fail to sustain the position that this transaction amounted to a payment and discharge of the mortgage. It differs from many of them in the fact that this was a purchase, and in form an assignment of the mortgage. It differs from the cases where there was an agreement on the part of the purchaser of the equity that he would pay and redeem the mortgage.

It was said by this court in *Brown* v. *Lapham*, 3 Cush. 554, 555, "if the money is advanced by one whose duty it is by contract or otherwise to pay and cancel the mortgage, and relieve the mortgaged premises of the lien, a duty in the proper performance of which others have an interest, it shall be held to be

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a release and not an assignment, although in form it purports to be an assignment. Where no such controlling obligation or duty exists, such an assignment shall be held to constitute an extinguishment or an assignment, according to the intent of the parties, and their respective interests in the subject will have a strong bearing upon the question of such intent." Upon examining the facts in this case, we find no obligation on the part of the defendant to pay this mortgage, and his interest clearly required him to hold the same by assignment, as this was the only effectual mode to secure his rights against a claim of dower in the entire estate, discharged of the mortgage. As the holder of the equity of redemption, and to make the same effectual, he might well purchase the mortgage and take an assignment of the same, paying therefor the amount of the original note with interest, without reviving the right of dower, which had been legally barred, or, as in the present case, had never existed, to the extent of the debt secured by the mortgage. *Popkin* v. *Bumstead*, 8 Mass. 491. *Gibson* v. *Crehore*, 3 Pick. 475. *Hunt* v. *Hunt*, 14 Pick. 383. The result is, therefore, that, as the tenant holds the right of the mortgagee, the demandant cannot maintain this action. *Judgment for the tenant.*

Thomas Gillett *vs.* Western Railroad Corporation. Andrew Bean *vs.* Same.

A railroad company which so constructs its track at the crossing of a highway as to render the highway dangerous or inconvenient to travellers thereon is liable for an injury sustained by a traveller upon the highway, in consequence of the defect, although he might also have a remedy against the town which was bound to keep the highway in repair.

In an action to recover for injuries to a horse, sustained in consequence of a defect in a highway, the plaintiff is entitled to recover the diminution, occasioned by the injury, in the market value of the horse at the commencement of the action, and, in addition, such sums as the plaintiff has paid out in reasonable attempts to cure him, with a reasonable compensation for his own services in attempting to cure him, and a reasonable sum as compensation for the loss of the use of the horse while under such treatment; provided that the whole damages allowed do not exceed the value of the horse.

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Two actions of tort, the declaration in each of which alleged that there is in Springfield a public highway, called Main Street which is crossed by the railroad of the defendants, and the defendants have so constructed and maintained their railroad, at the crossing, as to obstruct the highway and render it unsafe and inconvenient for travellers, whereby the plaintiff, travelling on the highway and across the railroad, with his horse and wagon, and using due care, sustained an injury to his horse, &c., and was put to trouble and expense.

The cases were tried together in the superior court, before *Morton*, J., and it appeared in evidence that, at the crossing in question, the defendants, for the purpose of facilitating travel across their tracks, had caused the whole space between the rails to be planked, except about two inches in width next to the inside of the rails, which was left open to accommodate the flanges of the wheels of the cars and engines running thereon; that the edges of the planks next to the rail were plated with a strip of iron; and there was evidence tending to prove that the horses of the plaintiffs, while the plaintiffs were driving them across the tracks with ordinary care, were injured by catching their shoes in the space between a plank and rail, and, in attempting to move forward, their feet were firmly held between the rail and the iron plate upon the plank. The defendants objected that the actions could not be maintained against them, but should have been brought, for the alleged injury, against the city of Springfield; but the judge overruled the objection.

Upon the question of damages, the judge instructed the jury that the plaintiffs were entitled to recover the diminution of the market value of the horses, occasioned by the injury, and, in addition, such sums of money as the plaintiffs had paid out in reasonable attempts to cure them, with a reasonable compensation for their own services in attempting to cure them, and a reasonable sum as compensation for the loss of the use of their horses while under such treatment.

The jury returned verdicts for the plaintiffs, finding specially the amounts which they allowed for the care and expenses of

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trying to cure the horses, and, in one case, for the loss of the use of the horse. The defendants alleged exceptions.

J. D. Colt, for the defendants. These actions should have been brought against the city. The form of the declarations is important. They do not allege a nuisance created by the defendants; but a defective highway. For an injury arising from this cause, the city was primarily liable. Redfield on Railways, 391, 392. *Davis* v. *Leominster*, 1 Allen, 182. *Sawyer* v. *Northfield*, 7 Cush. 496. *Currier* v. *Lowell*, 16 Pick. 174. The facts showed that the railroad was built with all proper precautions, and, if so, the plaintiffs are without remedy. *Perry* v. *Worcester*, 6 Gray, 547. *Mellen* v. *Western Railroad*, 4 Gray, 301. *Jones* v. *Waltham*, 4 Cush. 302. The rule of damages was wrong. *Gardner* v. *Field*, 1 Gray, 151. *Coolidge* v. *Choate*, 11 Met. 79. The same rule does not apply to injuries to property which applies to injuries to the person. Under the ruling of the judge, the defendants might be held liable for much more than the market value of the property injured.

H. Morris, for the plaintiffs.

Bigelow, C. J. The defendants were clearly liable for damages to the plaintiffs, if they caused an unlawful obstruction to public travel in the highway, whereby injuries were occasioned to the plaintiffs' property. This liability exists notwithstanding a party may also have a remedy against the town or city where such obstruction is permitted. *Snow* v. *Housatonic Railroad*, *ante*, 443. By returning a verdict for the plaintiffs, under the allegations in the declarations, the jury must have found that the acts of the defendants rendered the highway unsafe and inconvenient to travellers. No question appears to have been raised at the trial as to the right of the defendants to construct their tracks across the highway. If they had this right, then it was their duty to construct them in such a manner as to be reasonably safe and convenient, in order to adapt them to the public travel passing on the highway, as well as to fit them for their own convenient use. Beyond this, no duty was imposed on them by law. They could only be required to exercise their legal right to construct their railroad across the highway in such a manner as to create

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no unnecessary obstacle or hindrance to public travel. By a compliance with this requirement, no unlawful or unauthorized obstruction would be occasioned in the highway. The way might be less safe and convenient for travellers than it would have been if the railroad had not been constructed over it, but it would not be unsafe and inconvenient in a legal sense. *Jones* v. *Waltham*, 4 Cush. 299. *Davis* v. *Leominster*, 1 Allen, 182. It does not appear that these familiar principles were overlooked or disregarded at the trial. There is nothing in the exceptions to show that full and appropriate instructions were not given as to the rights and duties of the defendants in constructing their railroad across the highway at the place where the alleged accident happened. In the absence of any statement of the instructions, it is our duty to presume that the jury were properly advised on this part of the cases. *Commonwealth* v. *Kneeland*, 20 Pick. 206, 223. *Same* v. *Byce*, 8 Gray, 461.

It does not appear that the rule of damages was incorrectly laid down at the trial. As we understand the instructions, the jury were told that the plaintiffs were entitled to recover a sum equal to the diminution of the market value of the horses, caused by the injuries; to be ascertained, not by their condition immediately after the occurrence of the accident, but by that in which they were shown to be at or about the time of the trial, and after they had been partially restored to health and soundness by restorative means which the plaintiffs had reasonably used in the relief and cure of the injuries which they had received. Thus construed, the instructions were clearly right. The plaintiffs were entitled to recover their reasonable expenses incurred in curing the horses, because thereby they had diminished the extent of the injuries, and the amount of damages which the defendants would otherwise have been liable to pay.

It does not appear that the expenses of curing the animals were unreasonable, or that they exceeded in amount the benefit which was thereby done in diminishing the injurious effects caused by the negligence of the defendants.

Exceptions overruled.

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Myron A. Bliss *vs.* Inhabitants of Wilbraham.

In an action against a town to recover damages for an injury sustained by reason of a defective bridge, no exception lies to the exclusion of a question put by the defendants, as to how the bridge compared, on the day of the accident, in respect to its safety and state of repair, with other bridges of like character on roads of like amount of travel.

If in such action there is evidence tending to show that the accident happened in consequence of the youth and vicious conduct of the plaintiff's horse, the defendants have no ground of exception to a ruling by the judge that "ordinary care requires a person driving on the highway to do so with a horse which will not, when exposed to ordinary objects and noises upon and along the highway, become unmanageable by a driver of ordinary skill and prudence;" and that, "if a vicious or untrained condition of the horse for ordinary public travel contributed with the insufficiency of the rail to produce the injury, the plaintiff cannot recover."

Tort to recover damages for an injury sustained by reason of a defective bridge.

At the trial in the superior court, before *Brigham*, J., it appeared that the plaintiff, while driving over the bridge, was thrown with his wagon into the water below; and there was evidence tending to show that the bridge was defective, and that the accident happened in consequence of the defect. The defendants called one Dwight who was in the habit of crossing the bridge, and asked him how it compared on that day, as to its safety and state of repair, with other bridges of like character on roads of like amount of travel; but the evidence was excluded.

The defendants introduced evidence tending to show that the plaintiff's horse was young and balky, and that he backed the wagon against the railing of the bridge with such force as to throw both railing and wagon into the stream. The judge instructed the jury that ordinary care would require a person driving on the highway to do so with a horse which will not, when exposed to ordinary objects and noises upon and along the highway, become unmanageable by a driver of ordinary skill and prudence in the management of horses; and that, if a vicious or untrained condition of the horse for ordinary public travel contributed with the insufficiency of the rail to produce the injury, the plaintiff could not recover.

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The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

H. Morris, C. A. Winchester & G. M. Stearns, for the defendants. The question proposed to the witness was competent. *Raymond* v *Lowell*, 6 Cush. 531. The instructions were not sufficiently favorable to the defendants. A vicious horse may not be unmanageable, but may be capable of being subdued; but the accident may occur before he has been subdued. The instruction was calculated to mislead the jury.

J. Wells & N. A. Leonard, for the plaintiff.

GRAY, J. 1. The question put to Dwight as to the safety and state of repair of this bridge, compared with others, was properly excluded. It did not relate, as in the case of *Raymond* v. *Lowell*, 6 Cush. 531, cited by the defendants, to the mode of constructing a particular part of the highway; but sought to obtain from the witness a statement of his opinion upon its general condition, which was the very question to be determined by the jury.

2. The defendants have no ground of exception to the instructions given to the jury in relation to the horse. It does not appear that this highway was so unlike other highways as to make a difference in the kind of horse which could be driven on it safely. The first instruction, as to the care required of the plaintiff so far as concerned the horse, was expressed with great clearness and precision; and the final instruction is to be interpreted with reference to it, as if it had read thus: If the horse was such as would, when exposed to ordinary objects and noises upon and along the highway, become unmanageable by a driver of ordinary care and skill, and this character of the horse contributed to produce the injury, the plaintiff cannot recover. Upon the whole instructions on this subject, taken together the defendants have no ground of exception.

Exceptions overruled.

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PLINY SMITH & another *vs.* CHARLES H. GOWDY & another.

A. wrote to B. as follows: "Say how many white, colored and woollen rags you have on hand, and your prices for them." B. replied: "I have about a ton each, white and colored rags, and my prices are three and one half cents for colored and seven cents for white. I have some hen and turkey feathers and some old glass which I should like to sell." A. replied: "I will take the rags at the price you name." B. made no written reply, but there was evidence tending to show a subsequent oral agreement by him to deliver the rags, which he afterwards refused to do. *Held*, that A. could not maintain an action against B. for the non-delivery.

CONTRACT to recover damages for the non-delivery of certain rags. The defence was the statute of frauds.

At the trial in the superior court, before *Vose*, J., the plaintiffs introduced evidence tending to show that they were dealers in rags and paper stock, and had bought them of the defendants prior to the alleged sale in question; that on the 3d of September 1862 they wrote to the defendants as follows: "Please inform us how many print papers you have for us. Also say how many white, colored and woollen rags you have on hand, and your prices for them." On the 6th of September the defendants replied as follows: "We have no papers on hand, save those which are mixed. We have about a ton each, white and colored rags, and our prices are three and one half cents for colored and seven cents for white. We have some hen and turkey feathers and some old glass which we should like to sell." On the 9th of September the plaintiffs replied as follows: "We will take the rags at the prices you name. When you get them ready, please inform us, and we will inform where to send them." One of the plaintiffs testified that some two weeks after September 9th he saw one of the defendants, who, in reply to an inquiry upon the subject, said that they would get the rags ready in a few days, and the plaintiff informed him where to send them; but that he afterwards saw the same defendant, who then refused to send them.

The judge ruled, upon this evidence, that the plaintiffs were not entitled to recover, and a verdict was accordingly returned for the defendants. The plaintiffs alleged exceptions.

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W. G. Bates & M. B. Whitney, for the plaintiffs. The word "price," when used by a seller of goods in reply to an inquiry by a buyer, includes within its ordinary and proper signification an offer of sale. Browne on St. of Frauds, § 313. *Gardner* v. *Joy*, 9 Met. 177. The letters constituted a sufficient note or memorandum of the agreement.

E. B. Gillett, for the defendants.

METCALF, J. These exceptions cannot be sustained. The evidence introduced by the plaintiffs, at the trial, failed to prove that the defendants made the contract with them for the breach of which their action was brought. That evidence consisted of three letters. The first was from the plaintiffs to the defendants, merely inquiring what were the quantity and price of rags which they had on hand. The second was the defendants' reply to the first, merely stating the quantity of rags which they had, and the price thereof. Thus far there was no offer of one party to buy, nor of the other party to sell. The third letter was from the plaintiffs, saying to the defendants that they would take the rags at the price which the defendants had named. This was the first offer in the case; and this offer the defendants never accepted in writing. And an oral acceptance, if they had made it, would not have bound them; the case being within the statute of frauds, (Gen. Sts. *c.* 105, § 5,) no part of the rags having been accepted and received by the plaintiffs, and nothing having been given by them in earnest to bind the bargain, or in part payment. It is clear, therefore, that no contract was completed; there having been no assent to a sale by the union of both parties' minds. No authorities need be cited in support of this elementary doctrine. *Exceptions overruled.*

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Hiram Converse *vs.* Henry C. Carter.

This court will not, in the exercise of its discretion, under Gen. Sts. c. 146, § 21, grant a review of a judgment rendered in the superior court, after a trial had by order of the judge, if the party aggrieved was heard upon the question of postponing the trial, and had an opportunity afterwards to apply to the same court for relief, and to present all the facts upon which the petition for review is founded, and if there is not clear proof of misapprehension, corruption or incapacity on the part of the judge.

Petition for review of a judgment recovered in the superior court for this county at October term 1863, by the respondent against the petitioner, upon two promissory notes of $1500 each, upon which the petitioner was an accommodation indorser.

At the hearing in this court, before *Dewey*, J., it appeared that the case was ordered for trial in the superior court out of its order upon the docket, and against the objection of the petitioner's counsel, and in the absence of the petitioner's witnesses, and that the evidence applicable to the defence of the original action upon the merits, which the petitioner contended that he was prevented from adducing at the trial, was material, and sufficient to entitle him to a review, if the judgment had been rendered upon a default, without opportunity to ask for a postponement of the trial. It did not appear that the petitioner afterwards applied to the superior court for relief in any form.

The case was reserved for the determination of the whole court.

J. Wells, for the petitioner.

H. Morris, for the respondent.

Dewey, J. The power to grant a review in all cases seems to be given to this court in the broadest terms by the Gen. Sts. c. 146, § 21. It is a salutary and important power, for the purpose of securing justice in cases for which no sufficient provision is otherwise made. Such a power must be regulated, in its exercise by us, by some practical rules, or every order of the subordinate courts falling within the class of matters within

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the discretion of such tribunal would be opened upon an application for review. We cannot suppose, while such rulings in matters of discretion are not subject to exceptions, and cannot be brought before us as such, that under a change of form in presenting the question to the court they may be made in all cases the subject of examination here, and the court is to be called upon to decide whether the presiding judge exercised his discretion wisely or unwisely. Hence this power of setting aside the proceedings of a subordinate court acting upon a matter within its discretion, by an application for a review, is to be exercised cautiously and sparingly, and only in cases in which it is made apparent that the rights of parties could not otherwise have been secured.

As one of the reasonable restrictions upon the exercise of this power of granting reviews in such cases, we think it must be held that this court should not grant such review when the question arises upon an order of the superior court in a matter within its discretion, and upon which the parties were heard at the time, and when the party had the further opportunity to apply subsequently to the same court to obtain proper relief, and to present all the facts upon which such application is founded, and where there is no clear proof of misapprehension, corruption or incapacity in the tribunal before which the case was heard.

The present petition should be decided by the application of these principles to the facts by the judge who reported the same.

Judgment was thereupon entered that the petition be dismissed.

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Charles G. Curtis *vs.* Daniel G. Littlefield & others.

A. and B. entered into a written contract, by the terms of which A. agreed to make within one year, for a certain price, one thousand sewing machines for B., using B.'s tools and machinery and all parts of machines already completed and in B.'s possession, and at the completion of the work to leave such odd parts of machines as might be on hand; B. agreed to furnish necessary materials, to expend a certain sum for machinery, and to advance, for A.'s convenience in paying for labor, a certain sum each month, with a further stipulation, in case A. should not realize for his own services as much as fifteen hundred dollars for the year, to pay him enough to make up that sum to him. After eight months' work under this contract, the parties mutually agreed in writing to annul it, A. agreeing to pay for all work done on the machines to a time three weeks prior to the making of the last agreement, and B. agreeing to pay for all work done since that time. *Held*, in an action by A. to recover for sums paid by him for work done since the time specified in the last agreement, that B. was not entitled to claim allowance for sums advanced by him from time to time, in pursuance of the original contract, or for articles furnished to A. for use in the construction of the machines.

Contract brought to recover, amongst other things, for sums of money paid by the plaintiff for labor done upon certain sewing machines, between the 1st and the 22d of March 1862, which he was making for the defendants, under a written contract, signed by him and them, dated July 23d 1861, the material parts of which were as follows:

"Mr. Curtis agrees to make, within one year, one thousand sewing machines, complete for placing upon tables, except ornamenting and silver plating." "Mr. Curtis is to have the use of any or all of the machinery and tools belonging to the company, for the purpose, at any time he may wish. He is to use the parts of machines already partially prepared on hand, and, on completion of the job, leave one hundred and eighty-four bed pieces finished — the same number as is now on hand — and also to leave such odd parts of machines as may be on hand at that time. Machinery to be carefully used, and left in good order, with all the preparation for manufacturing sewing machines. Sewing machine company to furnish necessary materials, and expend five hundred dollars, but not to exceed this amount, for machinery necessary for the business; to pay Mr. Curtis ten dollars per machine, for making as before stated.

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advancing for his convenience in paying labor a sum not exceeding one thousand dollars per month; the sum advanced not to be more than required for the above mentioned purpose. After the above agreement is fulfilled by Mr. Curtis, if it shall appear that he will make a loss at the above named price, reckoning his own services at the rate of fifteen hundred dollars per annum, then the sewing machine company agree to make up said loss to the amount of fifteen hundred dollars, but not exceeding that sum."

At the trial in the superior court, before *Morton*, J., it appeared that the plaintiff prosecuted the manufacture of sewing machines under this contract from the time of its date till the 22d of March 1862, the defendants advancing to him money within that time to the amount of $5100 in all, and also furnishing to him certain articles used in the manufacture of the machines, which were charged by them, in a declaration in set-off, in which the above items of cash were also included, at the sum of $231.36. The plaintiff testified that out of the cash so received by him he paid for all the labor of others which was done under the original contract, prior to March 1st 1862. On the 22d of March 1862, some difficulty arose between the parties, and they met and entered into the following agreement:

"This is to certify that the contract made between the Florence Sewing Machine Company and C. G. Curtis, on the 23d day of July A. D. 1861, to build one thousand sewing machines by the said Curtis, is hereby annulled by mutual consent, the said Curtis agreeing to pay for all labor done on said machines to the 1st day of March A. D. 1862, and the company for all labor done since that time."

The plaintiff offered evidence to prove the payment by him of the sums declared on. The defendants contended that, under the contract of March 22d 1862, and by the plaintiff's stipulation therein to pay for all labor done on machines prior to March 1st 1862, he became accountable to them for all the cash advanced, and also for the articles furnished by them to him, as stated above; but the judge ruled otherwise.

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The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

S. T. Spaulding, for the defendants.

J. Wells & M. P. Knowlton, for the plaintiff.

Bigelow, C. J. The construction of the agreement by which the parties stipulated to annul the previous contract subsisting between them seems to us to be free from difficulty. Construed with reference to such previous contract and the transactions of the parties under it, it is clear that the intention was that the plaintiff was to retain the money which had been advanced to him by the defendants for the purpose of paying for the labor done in manufacturing machines prior to the first day of March 1862, and was to pay all claims for such labor which accrued prior to that date; the defendants stipulating to pay for all work subsequently performed. This interpretation gives full effect to the words of the agreement, and seems to be the only reasonable and just view of which the stipulations of the respective parties are susceptible. The construction suggested by the defendants is open to the grave objection that it leads to a result so manifestly unequal and unjust that it could not have been contemplated by the parties. As construed by the defendants, the effect of the agreement would be that the property in all the machines, both those which were finished and those which were in process of manufacture on the first day of March 1862, would be vested in them, whereby they would receive the benefit of all the labor expended on them by the plaintiff and those whom he had employed to work on them during the eight months that the first contract was in force; while at the same time they would have a right to recover back all the money which they had advanced to the plaintiff under the contract on account of such labor. We cannot adopt an interpretation which gives to the stipulations of the agreement in question an operation so manifestly unreasonable.

Nor do we think that the defendants can recover for the articles charged in their account in set-off. These articles clearly come within that clause in the first contract by which the defendants agreed to supply materials necessary to the manufacture

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of the machines. The defendants had the full benefit of all their materials. They were used in the machines which were on hand, finished and unfinished, at the time the contract was annulled, and which were the property of the defendants. They cannot now seek to charge the plaintiff with the value of them.

The fallacy of the arguments urged by the defendants consists in the assumption that by the agreement annulling the first contract it is to be regarded as rescinded, *ab initio*, and that the rights of the parties are to be adjusted in the same manner as if no such contract had ever existed. Such, we think, was not the intent of the parties. On the contrary, the labor done, materials furnished and money advanced under that contract prior to the first day of March 1862 were treated by the parties as coming under its stipulations, and the claims of the respective parties arising out of their dealings and transactions under that contract were intended to be settled finally by the agreement which put an end to it; the effect of which was to give to the defendants the benefit of all the labor performed and materials supplied up to the date of the termination of the contract, and to allow the plaintiff to retain the money advanced, with which he was to pay for the work which had been performed prior to that time. *Exceptions overruled.*

Francis S. Graves *vs.* Stephen C. Bemis.

If labor and materials have been furnished and used in the erection of a building, under an entire contract, with no stipulation for any separate price for either, and there is no mechanic's lien for the whole, there can be none for any part.

Petition to enforce a mechanic's lien.

At the trial in the superior court, before *Brigham*, J., it appeared that A. L. Chapin agreed in writing to build a house for the respondent, according to certain specifications, for which the respondent agreed to pay sixty-four hundred dollars, "payments

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to be made as follows: one thousand dollars when the first floor timbers are on; two thousand dollars when the brick work is done; one thousand dollars when it is ready to plaster; and the balance on completion of contract." The petitioner agreed in writing with Chapin to do all of the mason's work for the house for twenty-five hundred and fifty dollars, "to be paid as follows: one thousand dollars when the brick work is done, and five hundred dollars when the plastering is done, and the balance on the first of July 1863." The petitioner fulfilled his contract, performed certain work described in his bill of particulars, and furnished certain materials for which he was not entitled to a lien. And it was agreed, provided evidence to prove the same would be competent, that the contract was a profitable one; that the profit consisted in the furnishing of the labor; that the bricks furnished had a definite market value; and that the prices named in the bill of particulars fairly denoted the value of the labor over and above the market value of the materials furnished, at the total price fixed by the contract.

Upon these facts judgment was ordered for the respondent, and the petitioner alleged exceptions.

G. M. Stearns, for the petitioner. This case may be distinguished from *Morrison* v. *Minot*, 5 Allen, 403. There are no payments; the value of the labor may be ascertained and stated; the contract was profitable, and means exist of showing on what part of the contract the profit accrued; and a just apportionment of the whole price could be made.

H. Morris & C. A. Winchester, for the respondent.

Hoar, J. Notwithstanding the distinctions shown by the counsel for the petitioner between this case and *Morrison* v. *Minot*, 5 Allen, 403, we are of opinion that it comes within the principle stated in that case. There was no contract to which the respondent ever assented for furnishing any labor separate from materials. The petitioner has never been entitled to any payment for labor, either by express contract, or by an implied contract on a *quantum meruit*. The contract was entire for labor and materials; and, there being no lien for the materials, there is none for the whole or for any part. There were other objections

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to the recovery by the petitioner in *Morrison* v. *Minot*, which do not apply to the case at bar; but this point in which they are precisely alike is decisive. *Exceptions overruled.*

ALMIRA L. LAZELL *vs.* WILLIAM H. LAZELL.

A right of homestead, acquired under *St.* 1855, *c.* 238, is not lost by a removal of the householder with his family therefrom into another house owned by him, if it does not appear that he intended permanently to abandon the estate from which he removed.

An estate of homestead may exist, under *St.* 1855, *c.* 238, in a country hotel.

The probate court has no jurisdiction to set out an estate of homestead, if the right to it is disputed by the heirs or devisees.

PETITION filed in the probate court by the widow of Joseph Lazell, to have an estate of homestead set out to her. The case came up upon an agreed statement of the following facts filed in that court:

The petitioner and her husband lived together in a house in Chester, which, with considerable land adjoining, he owned and carried on as a hotel from a period several years prior to 1855 down to the spring of 1863, when, having become too infirm to have the care of a hotel, he relinquished the business to a son by a former marriage, and removed with the petitioner to another house owned by him in Chester, in which they lived until his death, on the 27th of November 1863, and she has lived there ever since. He never acquired any homestead of record. The petitioner had no children by him. The petitioner did not contend that she was constrained by her husband to remove from the premises claimed as a homestead.

J. Wells, for the petitioner, cited *Doyle* v. *Coburn*, 6 Allen, 71; *Dulanty* v. *Pynchon*, Ib. 510, and cases cited.

W. G. Bates & E. H. Lathrop, for the respondent, cited, in addition to the above cases, *Drury* v. *Bachelder*, 11 Gray, 214; *Thurston* v. *Maddocks*, 6 Allen, 427.

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DEWEY, J. Looking at the facts stated in the present case, we are of opinion that the petitioner was entitled to the homestead claimed by her, and this, independently of the question whether under our present statutes a right of homestead can be lost by an abandonment of the same. The mere fact of cessation to occupy for a time is not an abandonment. Nothing short of a voluntary abandonment of an unequivocal character, and so understood by all the parties in interest, would divest the estate of a homestead interest charged thereon, if such defence can avail at all. Here was no sale of the premises by the husband, and the husband and wife had, for aught that appears, only temporarily gone to another house of the husband in the same village, in consequence of his infirm health, leaving this place in charge of his son, and this absence from the old homestead was only for the period of a few months before the death of the husband occurred. There is nothing to show that, in case of improved health, or whenever his convenience required it, he was not to return, or that in case of his death his wife did not purpose so to do. In the case of *Drury* v. *Bachelder*, 11 Gray, 214, there had been a temporary leaving of the house as the present residence of the husband and wife; and in *Dulanty* v. *Pynchon*, 6 Allen, 510, there was for a year a change of residence of the parties, and a lease of the premises for that period to another person, but with the intent to return, and this was held no abandonment. These and other reported cases indicate strongly the views of this court to be that if any abandonment can have the effect to defeat an existing homestead, upon which we express no opinion, it must be full and complete, and under circumstances that leave no doubt that such was the intention of all parties interested in the homestead right, and that they had a settled purpose not to return to the same as a place of residence.

As to the objection that a hotel is not a species of property which is embraced in the statute providing for homestead exemptions, if such objection could be taken as to a structure exclusively devoted to public entertainment, and of the character of those existing in our cities, it does not apply to hotels in

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country villages, attached to small farms or several acres of land, where the family residence is as much fixed and as perfectly enjoyed as in dwelling-houses occupied by private families.

The only doubt as to the disposition of the case arises upon a question not raised by the parties, whether this case is properly before us. It comes here to be considered upon an agreed statement of facts filed in the probate office, on behalf of the petitioner on one side, and the devisee of the estate on the other. If this right of homestead on the part of the petitioner was disputed by the devisee before the probate court, that court was thereby ousted of its jurisdiction, and the petitioner must have recourse to other tribunals to enforce her claim, as we have recently held in the case of *Woodward* v. *Lincoln*, decided in Bristol, in October.

The case having been presented to the court solely upon the question of the petitioner's right to a homestead upon the facts stated and agreed by the parties, we have declared our views upon the question thus presented; but it is proper to add that the probate court had no further jurisdiction in the matter, if the granting of the petition was opposed by the devisee. And for this cause no further proceedings can be had upon this petition, but the petitioner must enforce her claim to a homestead by other proceedings.

HENRY K. STRATFORD *vs.* WILSON AMES.

A deposition is not to be wholly rejected for the omission of the witness to answer a particular interrogatory fully, unless his answer is so imperfect or evasive as to induce the court to believe that he wilfully kept back material facts within his knowledge.

In an action to recover for particular services and articles, a witness for the defendant cannot be allowed to testify that the plaintiff once presented to him a bill against the defendant for the same services and articles, charged at a less amount, without producing the bill, unless some reason is shown for the failure to produce it.

CONTRACT brought by a physician to recover for professional services rendered and medicines furnished to the defendant.

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At the trial in the superior court, before *Vose*, J., the plaintiff was allowed to introduce in evidence his own deposition, which was objected to on the ground that the following cross-interrogatory was not fully and properly answered: "State whether or not you ever supplied the medicines, and performed the services set out in your declaration under any agreement, warrant or promise with said defendant, or any one, that if said defendant would take your medicine you would warrant him against a fever." Ans. "I did not make any agreement with anybody." The plaintiff was also allowed to introduce in evidence the deposition of a Dr. Blanchard, which was objected to on the ground that the following cross-interrogatories were not fully and properly answered: Int. "Of your own knowledge, state what medicines were administered by the plaintiff to the defendant, and give a synopsis of his treatment." Ans. "Febrifuge, cathartic, diaphoretic, diuretic and tonic; and these were given, as indicated by the symptoms, from time to time." Int. "Is the plaintiff a regularly educated physician? If so, where did he receive his education? Has the degree of M. D. ever been conferred on him, and, if so, at what institution?" Ans. "He is a well educated physician; I have no means of knowing where he graduated; I cannot say."

The defendant, for the purpose of showing that the plaintiff had at different times stated the amount of his bill differently from the amount now claimed, offered in evidence the deposition of Minor T. Ames, the seventh direct interrogatory to whom and the answer were as follows: "Did the plaintiff ever present to you a bill for services and medicine furnished by him to the defendant during his sickness above referred to, and, if so, what was the amount of the bill so presented?" Ans. "He did present a bill to me, and the amount of it was sixty-three dollars." Upon the objection of the plaintiff, the judge excluded the last part of both question and answer.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

H. B. Stevens, for the defendant.

E. H. Lathrop, for the plaintiff.

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GRAY, J. A deposition is not to be wholly rejected for the omission of the witness to answer a particular interrogatory fully, unless his answer is so imperfect or evasive as to induce the court to believe that he wilfully kept back material facts within his knowledge. *Savage* v. *Birckhead*, 20 Pick. 172. Tried by this test, the depositions objected to by the defendant were rightly admitted in evidence.

1. In the plaintiff's deposition, the word "agreement," in the answer objected to, was manifestly intended to cover the three synonyms of "agreement, warrant or promise," in the interrogatory.

2. The defendant, by joining in one cross-interrogatory inquiries as to medicines and medical treatment, may well have induced Dr. Blanchard to believe that the object of the interrogatory was simply to obtain a statement of the general nature of the remedies which he recommended, and not an enumeration of the name and cost of each medicine prescribed.

3. The answer that the plaintiff was "a well educated physician," coupled with the statement that the witness had no means of knowing and could not say where he received a degree, left no room for inference that the witness had not answered, to the best of his knowledge, the inquiry whether the plaintiff was "a regularly educated physician."

4. The only other exception taken is to the exclusion of testimony to the amount of a bill rendered by the plaintiff. But this was oral evidence of the contents of a single writing, for the failure to produce which no reason had been shown. It was therefore properly excluded. *Exceptions overruled.*

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COMMONWEALTH *vs.* JERE CASHMAN & wife.

If, on the trial of an indictment for being a common seller of intoxicating liquors, there is proof of sales of such liquors by the glass, in the defendant's dwelling-house, to be there drunk by the purchasers, a new trial will not be granted, after a verdict of guilty, although the judge erroneously refused to rule that it was incumbent on the Commonwealth to prove a want of authority in the defendant to make such sales.

INDICTMENT for being a common seller of intoxicating liquors.

At the trial in the superior court, before *Wilkinson*, J., the government, to sustain the indictment, relied upon proof of sales of ale, gin and whiskey by the glass, in the defendants' dwelling-house, to be there drunk by the purchasers. The defendants, after raising the same questions which were taken in *Commonwealth v. O'Donnell*, *ante*, 548, asked the judge to rule that it was incumbent on the Commonwealth to prove want of authority in the defendants to sell intoxicating liquors under the state laws; but the judge declined so to rule.

The jury returned a verdict of guilty, and the defendants alleged exceptions.

G. M. Stearns, for the defendants.

Foster, A. G., for the Commonwealth.

METCALF, J. Although it was wrongly ruled, at the trial, that it was not incumbent on the Commonwealth to prove want of authority in the defendants, under our laws, to sell intoxicating liquors; *Commonwealth* v. *Livermore*, 2 Allen, 292; yet that ruling did the defendants no harm. For it appears, on the bill of exceptions, that there was proof of sales, by the defendants, of ale, gin and whiskey (which are intoxicating) by the glass, to be drunk in their dwelling-house. This proof sustained the burden which was on the Commonwealth; for it conclusively showed that those sales were unauthorized; as no one can have authority, under our laws, so to sell liquors. *Commonwealth* v. *Livermore*, 4 Allen, 434. Since the *St.* of 1864, *c.* 121, the burden of proving want of authority to sell intoxicating liquors is no longer on the Commonwealth.

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The other exceptions are the same that were taken and overruled in *Commonwealth* v. *O'Donnell*, *ante*, 548.

Exceptions overruled.

GEORGE M. STEARNS & another *vs.* REBECCA BULLENS.

Promissory notes may be proved against the estate of the maker in insolvency, although the beneficial interest in them has become vested in his wife, if the legal title to them has not been transferred to her.

APPEAL by the assignees of Amaziah Bullens, an insolvent debtor, from a decree of the judge of insolvency, allowing the proof of certain promissory notes against Bullens's estate.

It was agreed, in the superior court, that the notes were signed by the debtor and made payable to his father-in-law, who died intestate in 1859, and were delivered by the administratrix, Rebecca Bullens, without indorsement, to the wife of the debtor, as a part of her distributive share in her father's estate, and remained in her possession till after the institution of the proceedings in insolvency, she holding them as her separate property, and receiving interest thereon for one or two years. The debtor and his wife were married prior to 1855. The notes were offered in proof by the administratrix, for the benefit of the debtor's wife.

Upon the foregoing facts, judgment was entered affirming the decree of the judge of insolvency, and the assignees appealed to this court.

G. M. Stearns, for the appellants.

J. Wells, for the appellee.

BIGELOW, C. J. We can see no legal obstacle in the way of allowing proof of these notes against the estate of the insolvent debtor. They are still valid debts which have never been paid, or extinguished by operation of law. It is not necessary to determine what would have been the effect, if they had been duly indorsed by the payee or his administratrix, and delivered to the

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wife of the promisor, so as to vest in her the legal title to them. No such transfer has been made, nor has any act been done by which the wife has entered into any contract with her husband in relation to these notes. It is true that she agreed to receive them as a part of her distributive share of her father's estate; but the legal title to the notes was not transferred, but remained in the administratrix of the payee. In legal effect, the title was held by the administratrix for the use and benefit of the wife. Inasmuch as a wife has by the statute a right to receive and hold property which comes to her by descent, devise, bequest, gift or grant, as her sole and separate estate, which she is empowered to use, collect and invest, and which is not subject to the interference or control of her husband, or liable for his debts, we do not see that she exceeds her authority or violates any legal principle by permitting such separate property to be invested in the notes of her husband, payable not to herself, but to a third person, who thereby becomes in effect her trustee, to hold the legal title to the notes in which she has the beneficial interest. By this mode of dealing, the wife does not become a contracting party with her husband. She cannot commence a suit on the notes in her own name. Her rights and remedies can be enforced only through the intervention of a third person. This obviates the difficulties which were found to be insuperable in the way of maintaining the actions in *Lord* v. *Parker*, 3 Allen, 127, and *Edwards* v. *Stevens*, Ib. 315. In this view, we are of opinion that the facts agreed respecting the delivery of the notes in controversy to the wife of the promisor, without a transfer of the legal title to them by indorsement, would constitute no valid defence to an action at law in the name of the administratrix of the payee to recover the amount thereof from the promisor, and that she may well offer them in proof as valid debts against his estate in insolvency.

To the objection suggested by the counsel for the defendant, that on the facts stated the administratrix could not properly take the oath prescribed by Gen. Sts. *c.* 118, § 28, in support of the proof of these notes, the answer is obvious. She is in law the owner of the notes; the legal title to them still remains in

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her, and she only can enforce them by legal process. The fact that the proceeds of the notes, when received, will be held by her in trust for the benefit of a third person is not inconsistent with the averment in the oath, that the debtor "was and is justly indebted to her." The notes not having been indorsed, the debts, in legal intendment, were due to the administratrix of the payee. *Decree allowing proof of claim affirmed.*

SYLVESTER JOHNSON *vs.* CAMDEN H. BABCOCK.

A heifer is exempt from attachment, if the debtor has no other animal of that kind.
A sale on execution of a heifer which is exempt from attachment, after notice that her owner claims her as exempt, will pass no title to the purchaser.

REPLEVIN of a heifer. It was agreed, in the superior court, that the plaintiff bought the animal in the summer of 1862, when she was but two days old, and kept her until December 1863, when she was taken from his possession by the defendant, who was a deputy sheriff, upon a writ against the plaintiff, and afterwards, in the following January, sold upon the execution which was obtained in the suit. The defendant afterwards purchased her. The plaintiff had no other animal of that kind, and claimed her of the defendant as exempt from attachment previously to the sale upon the execution, and demanded her return, which was refused. Upon these facts, judgment was ordered for the plaintiff, and the defendant appealed to this court.

E. H. Lathrop, for the defendant.

A. M. Copeland, for the plaintiff.

GRAY, J. A heifer is a young cow, and as such exempt from attachment if the debtor has no other. *Freeman* v. *Carpenter*, 10 Verm. 433. *Carruth* v. *Grassie*, 11 Gray, 211. *Pomeroy* v. *Trimper*, *ante*, 403. The sale of the heifer by the defendant on

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execution, after notice that the plaintiff claimed her as exempt from attachment, passed no title to the purchaser; and the heifer, being now no longer held by the attachment or execution, but claimed by the defendant under a subsequent purchase from the purchaser at that sale, may be recovered by this replevin.

Judgment for the plaintiff.

PORTER D. SIBLEY *vs.* WILLIAM LEFFINGWELL.

The admission of immaterial evidence to prove a conceded point furnishes no ground for a new trial.

If there is direct evidence that an attaching creditor, who has levied his execution upon a portion of a messuage, had actual notice, prior to his attachment, of an unrecorded deed of "the place," evidence that the portion upon which the execution was levied was inclosed with the rest of the premises and used for a garden is competent, for the purpose of showing that he knew that the deed covered the whole of the messuage.

It is incumbent upon one who seeks to establish a title under an unrecorded deed, against an attachment and levy of an execution, to prove that the attaching creditor had actual notice, at the time of his attachment, that there was then a subsisting deed of the premises; and if the judge so instructs the jury, no exception lies to his refusal to instruct them that it was necessary to prove actual notice of a valid deed, or that the attaching creditor sought to acquire a title under his attachment by fraud.

Proof of open occupation, possession and cultivation of land by one who has an unrecorded deed thereof, though not sufficient to warrant the inference that a third person has actual notice of such deed, is competent for the consideration of the jury, in connection with direct evidence that he had such actual notice.

WRIT OF ENTRY to recover twenty rods of land in Westfield. The tenant claimed title under an attachment of the premises, and a levy thereon of an execution against Nelson Alderman.

At the trial in the superior court, before *Vose*, J., the demandant offered in evidence, to support his title, the following deeds of the premises: One from William G. Bates to himself, dated February 1st 1860; one from himself to Nelson Alderman, dated July 28th 1860; and one from Alderman to himself, dated November 19th 1860, and recorded October 6th 1863. The tenant objected to the introduction of the deed from Mr.

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Bates, stating that he made no question of the demandant's title, to the time of his conveyance to Alderman; but the judge overruled the objection.

On the 14th of October 1862, the tenant commenced an action against Alderman, and attached all his real estate in Hampden county, and on the 14th of July 1863 levied the execution, which issued upon the judgment which he recovered therein, upon the demanded premises. The demandant introduced evidence of different conversations in July, and in August or September 1862, in which the tenant was informed and expressed his knowledge that "the place" on which Alderman was then living had been reconveyed by him to the demandant. The demandant was then permitted to testify, under objection, that he built a house upon the premises described in the several deeds, and that the piece of land set off on the tenant's execution was a portion of said premises, used for a garden, and inclosed with the rest of the premises.

The tenant requested the court to instruct the jury that the burden of proof was upon the demandant to show that the tenant, at the time of his attachment, had actual notice that there was a valid, subsisting deed, from Alderman to the demandant, of the land embraced in the levy; and that the tenant sought to acquire a title, by virtue of the attachment and subsequent proceedings, by a fraud upon the demandant. The judge, instead of so ruling, instructed the jury that the burden of proof was upon the demandant to satisfy them that the tenant, at the time of his attachment, had actual notice that there was then a subsisting deed of the land embraced in the levy from Alderman to the demandant; that the evidence that the demandant, holding an unrecorded deed of the premises, had been and was in open possession and occupation thereof at the time of the attachment or levy, was not sufficient to warrant them in finding that the tenant had actual notice of such deed, though it was competent for their consideration, in connection with the alleged conversations of the tenant, to explain the language used therein; that no implied or constructive notice of the existence of Alderman's deed would be sufficient, but that

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they must be satisfied that the tenant knew, at the date of his attachment, that the demandant had a deed from Alderman, covering the premises levied upon.

The jury returned a verdict for the demandant, and the tenant alleged exceptions.

M. B. Whitney & N. T. Leonard, for the tenant, cited, besides cases cited in the opinion, *Parker* v. *Osgood*, 3 Allen, 487.

J. Wells & H. Fuller, for the demandant, cited, besides cases cited in the opinion, *Dooley* v. *Wolcott*, 4 Allen, 406; *Mara* v. *Pierce*, 9 Gray, 306.

Bigelow, C. J. 1. The deed from Bates to the demandant was competent, when offered as part of the chain of title by which the demandant claimed a right to recover the premises in controversy; and although the admission of the tenant, that he did not dispute the demandant's title under that deed, but claimed to hold the premises by a subsequently derived title under the demandant, rendered the deed immaterial as evidence, yet its introduction could in no way have injured the tenant or prejudiced his rights. A verdict will not be set aside when an exception is taken to the admission of evidence which, though incompetent or irrelevant, is manifestly wholly immaterial. *Commonwealth* v. *Bailey*, 11 Cush. 415. *Doane* v. *Baker*, 6 Allen, 260.

2. The evidence of the occupation of the premises in dispute as one entire messuage by the demandant was competent, not for the purpose of proving notice to the tenant of the reconveyance of the premises to the demandant by Alderman, but in order to show that the tenant, when he spoke of such reconveyance and admitted his knowledge of it, also knew that it covered the whole of the demanded premises. For this special purpose it was admitted, and the jury were instructed to consider it in that connection only.

3. The instructions to the jury were full and accurate, and in conformity to the well settled construction of the statute requiring actual notice of a prior unregistered deed, in order to invalidate the title of a subsequent purchaser and grantee. An attempt to acquire a title by setting up a recorded deed, or an

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attachment and levy, subsequent in date to a previous deed, of which a purchaser or creditor has actual notice, is of itself a fraud on the holder of such prior deed. *Curtis* v. *Mundy*, 3 Met. 406. *Lawrence* v. *Stratton*, 6 Cush. 167, 169. *Pomroy* v. *Stevens*, 11 Met. 244. *Exceptions overruled.*

HENRY B. METCALF & another *vs.* ELIAS CADY & others.

A bill in equity brought by an assignee of an insolvent debtor against several defendants to set aside mortgages of real estate executed to each of them separately, on the same day, by the insolvent debtor, in violation of the insolvent laws, and also other mortgages of other real estate executed by him to a portion of the defendants separately, on another day, in violation of the insolvent laws, is multifarious.

A bill in equity does not lie, in favor of an assignee of an insolvent debtor, to set aside several mortgages of the same real estate, each of which contained a reference to the others, and was executed by the debtor on the same day to different creditors, in violation of the insolvent laws.

BILL IN EQUITY, brought by the assignees in insolvency of Benjamin Little, against nine persons, to set aside mortgages executed to them by the debtor, for the purpose of giving to them respectively an unlawful preference. The bill set forth that on the 22d of September 1862 the debtor executed seven of the mortgages to seven of the defendants, respectively, each of which was of the same land, and contained a clause referring to the others, as follows: "Except the mortgages this day executed simultaneously with this;" that on the 25th of said September the debtor executed four mortgages of other real estate than that included in the above mortgages, to four of the same seven defendants, respectively, each of which was of the same land, and contained the same clause referring to the others as that copied above; that on the 26th of said September the debtor executed two mortgages of all the real estate included in both of the former mortgages, to the other two defendants, respectively, each of which referred to the other and also to all of the former mortgages. The bill contained the necessary averments to show

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that all of these mortgages were in violation of the insolvent laws, and a prayer that the mortgages might be declared void, and the several mortgagees required to release and surrender the lands and discharge the mortgages, and for other relief. The first seven defendants filed a demurrer, assigning for cause, amongst other things, that the bill was multifarious, and that the plaintiffs had a plain, adequate and complete remedy at law.

W. G. Bates, for the defendants.

J. Wells, for the plaintiffs, besides some of the cases cited in the opinion, cited *Coleman* v. *Barnes*, 5 Allen, 374; *Robinson* v. *Guild*, 12 Met. 323; *Bugbee* v. *Sargent*, 23 Maine, 269; *Robinson* v. *Cross*, 22 Conn. 171; *American Ins. Co.* v. *Fisk*, 1 Paige, 90; *Boyce* v. *Grundy*, 3 Pet. 210; *Bartholomew* v. *McKinstry*, 2 Allen, 448.

Dewey, J. The first ground of demurrer to the bill is, that it is multifarious. In looking at the case stated, we find the relation of the plaintiffs to the matters in controversy to be that of assignees of Benjamin Little, an insolvent debtor, who in their representative capacity seek to establish their title to certain parcels of real estate formerly belonging to said Little, and by him conveyed by deeds of mortgage to the various defendants named in the bill.

As to one of these parcels, that embraced in the conveyances of September 22d 1862, made to seven of the defendants, if this bill had been confined to that one subject and to those parties merely, it would seem to be highly questionable whether the objection of multifariousness could be properly urged. Although these seven grantees hold their respective titles by seven distinct mortgage deeds, yet as they were made simultaneously, and each referred to the others, and they are alleged to have been made to parties who all entertained the purpose of placing this property beyond the reach of other creditors, it would present a case where much authority might be found for holding that the uniting of such parties in one common bill would not render it multifarious. *Brinkerhoff* v. *Brown*, 6 Johns. Ch. 157. *Varick* v. *Smith*, 5 Paige, 160. *Mix* v. *Hotchkiss*, 14 Conn.

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32. *Robinson* v. *Cross*, 22 Conn. 171. *Dimmock* v. *Bixby*, 20 Pick. 377. Story's Eq. Pl. §§ 271–286, and cases cited in the notes.

But including as a subject of this bill another and distinct parcel of land conveyed by the debtor on the 25th of September 1862, in which only four of the seven grantees of the first named parcel have any interest, presents a case of multifariousness. This would seem to be the plain case of a misjoinder of subjects of complaint, as to one of which the three defendants who have no interest or connection therewith may properly object. A bill is multifarious which embraces distinct matters affecting distinct parties who have no common interest in the distinct matters.

The further cause of demurrer is, that the plaintiffs have a complete and adequate remedy at law. That would be by a writ of entry. Whether this is a complete or adequate remedy is a question upon which courts of equity differ. If it be essential to such remedy that the court shall not only declare the title of the mortgagees void and of no effect, but also require releases from them of all claims to the premises, an action in a court of law would not give a complete remedy. This court has not taken that view of the question, but has held in several cases that, where the plaintiff had the usual remedy at law of proceeding by a writ of entry to enforce his legal rights to recover possession of real estate and establish his title thereto, that was a complete and adequate remedy, and that in such case he could not sustain a bill in equity. These decisions embrace cases where the plaintiffs in bills in equity were assignees of insolvent debtors, seeking to set aside deeds alleged to have been made in fraud of the insolvent laws. *Woodman* v. *Saltonstall*, 7 Cush. 181; *Pratt* v. *Pond*, 5 Allen, 59; and *Clark* v. *Jones*, 5 Allen, 379, seem to be directly to this point. If therefore the present bill had been instituted against one of the persons taking a mortgage of the real estate of the insolvent, it would not be sustained if the defendants had assigned as a cause of demurrer that the plaintiffs had a plain, adequate and complete remedy at law.

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The further inquiry is, whether the alleged fact that the prosecution of this claim at law would require numerous suits would, if this bill were amended so as to constitute it a bill against the seven grantees in the mortgage deeds executed on the 22d of September 1862, furnish a sufficient ground for taking this case out of the rule applied in *Clark* v. *Jones*, and the other cases cited. We are not prepared to say that these seven parties might not be all joined in one action at law, the assignees claiming a right to the whole parcel, and the various grantees all denying that right and claiming under simultaneous mortgage deeds connecting them as parties to the disputed title.

In the opinion of the court, this demurrer may well be sustained as to the claims set forth in this bill, upon the ground that the plaintiffs have a plain and adequate remedy at law for avoiding these mortgages, if they are invalid for the reasons alleged. *Bill dismissed.*

CHARLES W. HUBBARD & another *vs.* JOHN BROWN.

A mechanic's lien is not defeated by his including in his statement, as a part of his claim for labor and materials "in building and erecting a house," items of charge for labor and materials in building a fence and other structures which were included in the same bargain, provided he honestly supposed he had a lien therefor, and a right to claim it in that manner.

If, after a contract for building a house and structures connected therewith has been substantially performed, and a bill rendered for the work done under the same, further work is done, which the proper performance of the contract calls for, and not for the purpose of fixing a later date from which to compute the time allowed by statute for filing a statement to enforce a mechanic's lien, the time of performing such further labor may be taken as such date.

PETITION to enforce a mechanic's lien on a house and land in Springfield. The statement of the petitioners, which was filed in the city clerk's office on the 22d of July 1863, set forth that they had "performed and furnished labor, and furnished and actually used materials in building and erecting (in part) a house on land owned" by the respondent, "and that there was

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justly due for said labor and materials the sum of $1326.05, according to an account thereto annexed; and that they ceased laboring on and furnishing materials for said house on the 26th of the previous June. The account contained a great many items, the last of which were for work and materials, amounting to $3.43, on the 26th of said June; the last previous items being dated June 20th.

At the trial in the superior court, before *Vose*, J., it appeared that in February 1863 the petitioners agreed with the defendant to alter and enlarge his house, and to build the fences about it, they furnishing men at a stipulated price per day; that the items in the account prior to June 26th included charges for the fences; that the charges on the 26th of June were for steps set in the garden, and steps put up at the back door of the house, on the day before, in the absence of the defendant; and that on the 15th of July one of their men put some stops on the small windows over two doors. The petitioners testified that the job would not have been left in a proper or workmanlike manner, or have been properly completed, if the stops had not been put over the windows; that, when they filed their statement, they supposed that they had a lien for the work done and materials furnished for the fences, and that "they had a right to claim such lien upon the property as they did," and did not intend to claim more than was due to them upon their lien.

The defendant testified that he moved into the house on the 1st of June, and knew of no work done there after the 9th of June; that shortly after that date he called on the petitioners for their bill, which they rendered to him on the 20th of that month. The bill was put in evidence, and identified.

The respondent contended that upon the undisputed facts the lien was defeated, because the petitioners had knowingly and wilfully included in their claim of lien upon the house items of charge for the fences; that, there being no evidence to show what portion of the charges of June 26th was for the steps in the garden, no lien upon the house can be enforced therefor, and the labor done and materials furnished therefor will not entitle the petitioners to compute from then the time for filing their

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statement; and that the charge of July 15th would not prevent the thirty days from running from the rendition of the bill on June 20th.

The judge declined so to rule, and instructed the jury that if the petitioners believed, when they filed their statement, that they had a right to claim a lien on the premises for the fences, and that their lien covered all the work done on the premises, and did not intend to claim more than was due to them under their lien, and in good faith filed their statement in this belief, the statement was sufficient to enable them to maintain their proceedings to enforce the lien, although it erroneously included a claim for fences and steps to which their lien did not extend; that the burden of proof was on the petitioners to show when they ceased to labor or furnish materials; that if after June 20th they in good faith, in the honest execution of their contract, performed any labor or furnished any materials which the proper and substantial performance of their contract called for, the date thereof would be the time when they ceased to labor or furnish materials; but if the contract had been substantially performed on the 20th of June, and the petitioners thereafter performed some trifling amount of labor or furnished some materials not necessary to the complete performance of their agreement, for the purpose merely of fixing some date, in reference to filing their statement, the date thereof would not be the time when they ceased to labor or furnish materials, within the meaning of the statute.

It was agreed, before the trial, that the jury should only pass upon the right of the petitioners to maintain their petition, and that, if their verdict should be for the petitioners, the amount due should be fixed by an assessor.

The jury returned a verdict for the petitioners, and the respondent alleged exceptions.

J. Wells, for the respondent.

G. M. Stearns, for the petitioners.

Gray, J. If this case required us to decide whether a builder had by statute a lien upon a dwelling-house for work on and materials of fences around the lot on which the house stood, we

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might hesitate to sustain the verdict. *Donaldson* v. *Wood*, 22 Wend. 400. *McDermott* v. *Palmer*, 4 Selden, 383. *Barclay's Appeal*, 13 Penn. State R. 497. *Gaule* v. *Bilyeau*, 25 Penn. State R. 522, 523. *Truesdell* v. *Gay*, 13 Gray, 311. *Rathbun* v. *Hayford*, 5 Allen, 406. But that question does not here arise.

1. The first question presented by these exceptions is, whether the petitioners' lien was defeated by their statement that all the work was done on the house, when a part of it was in fact upon the fences.

The *St.* of 1851, *c.* 343, § 2, required the certificate filed by the claimant in the registry of deeds to contain "a just and true account of the demand justly due to him, after all just credits given." Under that statute, including in the certificate a lien on a fence, which was inadmissible by law, would doubtless have defeated the lien. *Lynch* v. *Cronan*, 6 Gray, 531. *Truesdell* v. *Gay*, 13 Gray, 311. But that statute was found so inconvenient and unjust in its operation, that it was amended by providing that "no inaccuracy" in the statement filed in the office of the city or town clerk, "relating to the property to be covered by the lien, if the property can be reasonably recognized, or in stating the amount due for labor" (to which the General Statutes have added "or materials"), "shall invalidate the proceedings, unless it shall appear that the person filing the certificate has wilfully and knowingly claimed more than is his due." *St.* 1855, *c.* 431, § 3. Gen. Sts. *c.* 150, § 6. A petitioner "wilfully and knowingly claims more than is his due," only when he claims something which he knows not to be due; not when he claims what he honestly, though mistakenly, believes to be due to him. Any other construction would make this beneficial amendment of no effect. *Parker* v. *Bell*, 7 Gray, 433. *Whitford* v. *Newell*, 2 Allen, 426.

In *Lewin* v. *Whittenton Mills*, 13 Gray, 100, the petitioners in their statement claimed a lien for the whole sum to be paid under a contract, which the same statement showed had been only partly performed, and thus manifested that they knew that their whole claim was not due. But we cannot think it impossible or unreasonable that a house carpenter should honestly

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believe that a fence around a house was so far a part of it as to be included in his lien on the house itself; although the law might limit his lien more strictly.

2. The work and materials furnished on the 20th of June, in attaching to the house steps leading from it to the garden, if necessary to the substantial and proper performance of the building contract, and added in good faith, were included under the contract. The work on these steps was done within thirty days before the filing of this petition, as required by the Gen. Sts. *c.* 150, § 5. The omission, in the petitioners' account, of the date of July 15th opposite the charge for putting up the window stops, if accidental, would not defeat their claim.

The questions of the petitioners' good faith in including the fences in their certificate, and in doing the work on the garden steps and the window, were submitted to the jury under well guarded instructions, sufficiently favorable to the respondent.

Exceptions overruled.

Chester W. Chapin *vs.* Samuel Harris.

A grant of land adjoining a railroad, with the water power of a brook upon the land, running along by the side of the railroad, and the right of making a dam across the brook, and abutting upon the embankment of the railroad, "provided said dam shall be so built as to answer for a street to the railroad, and said street is to be opened three rods wide" across the granted premises to the railroad, and the grantee "is to make the road," is not a grant upon a condition subsequent.

Writ of entry to recover certain real estate, with a water power, in Springfield.

At the trial in the superior court, before *Brigham*, J., it appeared that in 1838 the demandant and others, being the owners of the Emery Farm in Springfield, conveyed to the Western Railroad Company a strip five rods wide across it, from east to west, for their railroad, with the privilege of constructing a new channel for Garden Brook, so as to turn the same south of the

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railroad; and reserving to the grantors and their heirs and assigns the right to erect and forever maintain a dam across the brook, and abut the same against the embankment, of such height as to raise the water within four feet of the top thereof. A street, to be three rods wide and called Spring Street, was then or shortly afterwards contemplated, running northerly and southerly across the farm, brook and railroad; and such street was referred to in a deed from said owners, in September 1839. In August 1843 the demandant conveyed to Charles Stearns, by deed of warranty, "the following tract of land, situated in said Springfield, being part of the Emery Farm (so called). Beginning on the south side of the railroad line, where Spring Street is to cross it, and running westerly on said railroad, one hundred and sixty-four feet; thence southerly parallel to Spring Street to the south line of said Emery Farm; thence easterly on said south line one hundred and sixty-four feet to Spring Street; thence northerly on Spring Street to the first bound. Also the water power in Garden Brook, with the right of making a dam adjoining the railroad, as was reserved in the deed to the railroad corporation, and with a right to flow as far up the stream as said Emery Farm extends," "provided said dam shall be so built as to answer for a street to the railroad, and said Spring Street is to be opened three rods wide across said farm to the south line of said railroad, and the said Stearns is to make the road." Other parts of this deed are stated in the opinion.

The tenant claimed title under this deed; and it appeared that the dam had never been constructed so as to answer for the continuation of Spring Street, which was opened for use, though the formal location thereof, in 1860, was subject to the same objections which defeated a new location of another street in Springfield, as shown in 4 Allen, 488. The demandant had duly entered upon the premises, before bringing this action.

Upon these facts, and others which are now immaterial, the judge ruled that the action could not be maintained; and a verdict was accordingly returned for the tenant, and the case reported for the determination of this court

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J. D. Colt, for the demandant.

J. Wells, for the tenant.

GRAY, J. The deed from Chapin to Stearns, under which the tenant claims title, grants, 1st, a tract of land bounded by the railroad on the north and by Spring Street on the east; 2d, "also the water power in Garden Brook," (which ran south of the railroad, and entered from the east the land first granted,) "with the right of making a dam adjoining the railroad," "and with a right to flow" a certain distance up the stream, "and the privilege of deepening the brook below" for a certain distance; 3d, "also a tract of land east of Spring Street, bounded northerly on the pond created by said dam." The words on which the demandant relies as annexing a condition to all the premises granted are inserted immediately after the grant of the right of making a dam, of flowing back the stream above, and of deepening it below, and are as follows: "Provided said dam shall be so built as to answer for a street to the railroad."

It is true, as the demandant contends, that "provided" is an apt word to create a condition. Yet it is equally well settled that it does not necessarily import a condition; and it is often used by way of limitation or qualification only, especially when it does not introduce a new clause, but only serves to qualify or restrain the generality of a former clause. *Cromwel's Case*, 2 Co. 72 *a*. Co. Litt. 146 *b*, 203 *b*, and Butler's note. A good illustration of this is thus reported in Leonard: "A. made a lease to B. for life, and further grants unto him that it shall be lawful for him to take fuel upon the premises; proviso, that he do not cut any great trees. It was holden by the court, that if the lessee cutteth any great trees, that he shall be punished in waste; but in such case the lessor shall not reënter, because that proviso is not a condition, but only a declaration and exposition of the extent of the grant of the lessor in that behalf." 3 Leon. 16.

So in this case, no obligation is imposed on the grantee to make a dam, or set back the water, or deepen the channel. He is simply granted the right of making a dam, and flowing up

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the brook, and deepening it below, provided the dam is built in a certain manner. The manifest intent is to qualify the generality of the grant, and to limit the kind of dam which the grantee may build, just as in the case in Leonard to limit the kind of wood which the grantee might cut; and not to create a condition.

But if these words could be treated as creating a condition, it is quite as clear that they would not apply to the land granted, but only to the mode of using the easement granted with the land. If a condition had been thus annexed to that easement, and had been broken, it would not avail the demandant; for an easement appurtenant to land of another, and which cannot be enjoyed except in connection with it, cannot be taken from him by writ of entry, while he has not forfeited and still owns the land. *Judgment for the tenant.*

Charles W. Stearns *vs.* Samuel Harris.

If after a grant of land upon a condition subsequent, the estate of the grantor is assigned under the insolvent laws of this commonwealth, the grantor cannot thereafter maintain a writ of entry to recover possession of the granted premises for a breach of the condition.

Writ of entry to recover land in Springfield. The parties submitted the case to the superior court on facts, which are stated in the opinion, on which *Brigham*, J. gave judgment for the tenant, and the demandant appealed.

J. D. Colt, for the demandant.

J. Wells, for the tenant.

Gray, J. The demandant seeks to maintain this writ of entry upon the ground that a condition subsequent in a conveyance of land made by him to Alpheus Nettleton in 1843 has been broken, and the land thereby forfeited. But it appears

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that in 1851, after the breach of condition, and before bringing this action, the demandant became insolvent and his estate was duly assigned under the insolvent laws of the Commonwealth; and the tenant contends that the right to take advantage of any such breach of condition is therefore in his assignee in insolvency.

The words of the insolvent law, describing and enumerating the property and rights of property which pass by the assignment, are large and comprehensive, and have always been liberally construed by the court, so as to include every valuable right in property, real or personal, not clearly excepted, whether legal or equitable, absolute or conditional, which could have been enforced by the debtor in any kind of judicial process. *Gray* v. *Bennett*, 3 Met. 525. *Gardner* v. *Hooper*, 3 Gray, 403, 404. *Dehon* v. *Foster*, 4 Allen, 551, 552. Indeed the statute expressly declares that the assignment of the debtor's property shall vest in the assignees "all his rights of action for any goods or estate, real or personal," and that "the assignees shall have the like remedy to recover all the said estate, debts and effects in their own names, as the debtor might have had if no assignment had been made." St. 1838, *c.* 163, § 5. Gen. Sts. *c.* 118, § 44.

The question then is, whether the demandant at the time of his insolvency had a right of action to recover this land. By the rules of the common law, he clearly would not have had; for an entry on the premises would have been necessary to avoid the conditional estate before bringing his action. But the Revised Statutes declared that a writ of entry to recover any estate of freehold might be maintained by proof of title and right of entry in the demandant, without actual entry. Rev. Sts. *c.* 101, §§ 1, 4, 8. And it was adjudged by this court, upon argument and full consideration, within three years after those statutes went into operation, that this change in the law was not confined to the ordinary case of a writ of entry against a disseisor, but extended to a writ of entry to enforce a forfeiture for breach of condition. *Austin* v. *Cambridgeport Parish*, 21 Pick. 220, 224. We cannot reconsider a deliberate judgment

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of this court upon such a question without danger of unsettling rights of property which have been acquired under this construction of the law.

The demandant therefore cannot maintain this action. As our decision upon this point is a final disposition of the case, it is unnecessary to consider the other questions argued at the bar.

Judgment for the tenant affirmed.

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ARBITRAMENT AND AWARD.

1. Arbitrators appointed under a rule of court to hear and determine a complaint for flowing land have power to award concerning costs, so far as such costs are authorized by law; and to include therein the costs of reference, but not an attorney's fee at the hearing before them. *Jones* v. *Carter*, 431.

2. If such arbitrators, after assessing damages in favor of the complainant, add to their award, "The complainant's cost of reference, as taxed and determined by the referees," with a statement of the items, this is a finding that the complainant is to recover his costs so taxed. *Ib.*

3. If the subject matter of a suit at law is submitted to arbitration, an award that the plaintiff shall pay all the costs of the suit is by necessary implication a finding that he shall recover no damages. *Sears* v. *Vincent*, 507.

4. Under a submission authorizing arbitrators to determine how much shall be paid for the grant of a right of way, they may award that nothing shall be paid therefor. *Ib.*

5. If parties to a suit at law submit the subject matter thereof to arbitration, and include in the submission separate matters, one of which affects the rights of a third person, an award in favor of the defendant, as to the subject matter of the suit, will be a bar to the further prosecution of the action, although it may not be binding upon such third person. *Ib.*

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2. An attachment upon a writ against an insolvent debtor, of property which belonged to him before his insolvency, will render the attaching creditor and others who take the property under the attachment liable, as for a conversion,

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to one who was in possession of it at the time of the attachment under a claim of title. *Hubbard* v. *Lyman*, 520.

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See INSOLVENT DEBTORS, 1, 2; JUDGMENT, 1; MORTGAGE, 21; RECOGNIZANCE, 3.

ATTORNEY.

Oral admissions made by an attorney out of court in a conversation had for the purpose of settling a suit, though relating to facts in controversy in the suit, are not admissible in evidence against his client. *Saunders* v. *McCarthy*, 42.

See BURDEN OF PROOF.

AUCTION.

See MORTGAGE, 20.

AUDITA QUERELA.

1. If a writ which is brought upon a just claim is served by leaving a summons at the debtor's last and usual place of abode, and he, though knowing of the commencement of the action, never receives the summons, and afterwards commences proceedings in insolvency, and does not appear to defend or procure a continuance of the action, he cannot thereafter maintain an *audita querela* to set aside a judgment rendered against him therein. *White* v. *Clapp*, 283.

2. An appeal lies from the decision of a judge of the superior court upon agreed facts on an *audita querela*. *Ib.*

AUTREFOIS CONVICT.

See INDICTMENT.

BAILMENT.

See COMMON CARRIER; CONTRACT, 6.

BANKS.

In an action against a bank to recover the penalty provided by Rev. Sts. *c.* 36, § 29, for delaying payment of its bills, it is not necessary to set out copies of the bills in the declaration. *Suffolk Bank* v. *Lowell Bank*, 355.

See USURY, 3.

BASTARDY.

1. If a woman who has made a complaint under the bastardy act neglects to prosecute the same, and the case is thereupon prosecuted by one of the officers named in Gen. Sts. *c.* 72, § 2, the supplementary complaint filed in the superior court must aver all the facts necessary to sustain the prosecution. *Jones* v. *Thompson*, 334.

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2. Such supplementary complaint may be amended. *Ib.*
3. If such complainant has taken out a warrant, and has omitted for six weeks to cause it to be returned, this court cannot say on exceptions that this was not a sufficient neglect to prosecute the case to authorize the prosecution of it by one of the officers named in Gen. Sts. *c.* 72, § 2, although such neglect is not otherwise shown, and the original complaint is undisposed of. *Ib.*

BOARD OF HEALTH.

See NUISANCE.

BOND.

1. The sureties on the bond of the treasurer of a railroad company, the condition of which provides for his faithful discharge of the duties of the office "during his continuance in office, during the present year and for such further periods as he may from time to time be elected to said office," are not liable for defaults which occur after an omission to reëlect him at a regular meeting for that purpose, and after such further time as may be reasonably sufficient for the election and qualification of his successor, although he continues to act as treasurer, and is reëlected at the next regular meeting thereafter; but they are not discharged from their liability by a vote of the corporation postponing for five weeks the time of the regular meeting for the election of officers, and the consequent postponement of an election for that period, nor by the corporation's assuming the entire management of the railroad, after having leased it to another corporation. *Lexington, &c. Railroad Co.* v. *Elwell*, 371.
2. No formal vote of a corporation accepting their treasurer's bond needs to be shown, in order to entitle them to maintain an action upon it. *Ib.*
3. A corporation is not estopped to maintain an action upon their treasurer's bond by having accepted a report of an auditing committee who had approved his accounts, nor by making a report founded thereon to the legislature. *Ib.*
4. An indorsement by the treasurer of a corporation upon notes signed by himself, and running to the corporation, is sufficient evidence to render the sureties upon his bond liable for the amount indorsed, as for moneys received by him in his official capacity. *Ib.*
5. If the treasurer of a corporation has appropriated to his own use sums of money received from a certain source during the time covered by his official bond, and other sums received from the same source after the bond had expired, and he has afterwards entered upon the books a sum as received from that source, and such sum was not in fact received at the date of the entry, and there is nothing to show when the same, or the items of which it was composed, should have been entered, it is proper, in an action upon the bond to apply one half of it to the time covered by the bond. *Ib.*

See EXECUTORS AND ADMINISTRATORS, 4; MARRIED WOMAN, 1

BOUNTY.

See TOWN, 1.

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BRIDGE.

See ACTION, 2.

BURDEN OF PROOF.

In an action against an attorney at law to recover money collected in a suit in favor of the plaintiff, an answer which admits the collection of the money but avers that the plaintiff was only a nominal party to the suit, although it admits a *prima facie* case for the plaintiff, still leaves upon him the burden of proof to establish upon all the evidence his right to recover. *Ross* v. *Gerrish*, 147.

See FORCIBLE ENTRY AND DETAINER; FRAUD, 1; SPIRITUOUS AND INTOXICATING LIQUORS, 4.

BY-LAW.

See INSURANCE, 2, 4, 8.

CASES OVERRULED, DOUBTED OR DENIED.

DENNY *v.* ALLEN, 1 Pick. 147, ... *Bowditch* v. *Andrew*, 343.
DINGLEY *v.* DINGLEY, 5 Mass. 535, . . . " " "
DREW *v.* BIRD, Mood. & Malk. 156, . . . *Wooster* v. *Tarr*, 271.
MANN *v.* CHANDLER, 9 Mass. 335, . . . *Barlow* v. *Cong'l Soc. in Lee*, 461.
MOORSOM *v.* KYMER, 2 M. & S. 318, . . *Wooster* v. *Tarr*, 271.

COLLATERAL SECURITY.

1. The payee of a promissory note payable by instalments has a right to apply the proceeds of personal property held by him under a mortgage as collateral security, and sold under a power of sale contained in the mortgage, towards the payment of any instalments which may be due, at his option, if there is no agreement or direction to the contrary. *Saunders* v. *McCarthy*, 42.
2. In a suit upon a promissory note, in which the amount of the proceeds of certain collateral security realized by the plaintiff, consisting of standing trees, was in controversy, it appeared that the plaintiff had indorsed upon the note a certain sum as received by him therefor; and the defendant introduced and offered evidence to show that at one time the plaintiff and his brother said to him, "We have taken possession of the wood, and cut it off, and sold a part of it to Reed;" that Reed bought a lot of the plaintiff's brother for a larger sum than that indorsed upon the note, and never at any other time bought any wood of the plaintiff or his brother; that there was also a large quantity of wood left there after the sale to Reed, the amount and value of which he offered to prove; and that the defendant never had any of it. *Held*, that this evidence ought to be submitted to the jury for them to determine how much the plaintiff realized from his security, and that a direction to the jury to find a verdict founded upon the amount indorsed by the plaintiff was erroneous. *Ib.*

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COMMON CARRIER.

1. Common carriers doing business between certain points, and not undertaking personally for the carriage of goods to any further points, but merely engaging to forward them to their destination through the established lines of transportation beyond, are not liable upon their receipt for a bill of goods "for collection" from a person beyond the termination of their route, in the absence of any special contract creating an additional obligation for the failure of other carriers, to whom in the ordinary course of their business the bill was intrusted for collection, to pay over the amount received by them upon the same. *Lowell Wire Fence Co.* v. *Sargent*, 189.

2. The shipper named in a bill of lading is liable to the carrier for the freight, although he does not own the goods, and the carrier has waived his lien thereon. *Wooster* v. *Tarr*, 270.

3. A bailee for hire cannot excuse himself for the want of reasonable care in the custody of property intrusted to him, simply by showing that the owner knew and acquiesced in the kind and degree of care which he exercised. And if the owner did not know all the circumstances affecting the risk to which the property was exposed, and especially if he had informed the bailee that the manner of keeping it was unsafe, the judge cannot rule, as matter of law, that the owner waived due care on the part of the bailee. *Conway Bank* v. *American Express Co.* 512.

4. If a carrier who is in the habit of carrying large sums of money for hire, and keeping the same for several hours after its transportation, and until it is taken away by the owner, deposits money, which has been so carried, in a wooden desk, under lock and key, in his office, to which another person has access, and which is situated in a railroad station which is open to all comers, and then leaves the building for several hours in the middle of the day, with no person in charge of it, the judge cannot rule, as matter of law, in an action against the carrier for a loss of the money, that the evidence fails to show such want of care as to render him liable. *Ib.*

COMMON LANDS.

See WRIT OF ENTRY, 1, 2.

CONDITION.

See DEED, 5.

CONSTITUTIONAL LAW.

See TAXES, 1.

CONTRACT.

1. If one who by a written assignment is entitled to receive the earnings of another accepts an order to pay the same to third parties, when earned and received, he is bound to apply upon the acceptance all sums afterwards received by him, and has no right when receiving the same to agree to apply a portion thereof to the payment of other debts of the drawer, or to receive the

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same on condition that he will so apply them, or to assign to another person his right to receive such earnings, without the consent of the holder of the order. *Haskell* v. *Dennis*, 48.

2. A. and B. entered into the following contract: "The stock entered on this book is delivered to A., to be made into men's split brogans, and returned to B. as fast as done at 87½ cents per pair, B. to advance on each case $15." *Held*, that the title to stock delivered to A. under this agreement, and entered upon the book, remained in B., and that it was immaterial that A. used some portion of it in making brogans for others, and other portions of it, together with stock of his own, in making brogans for B., without objection from the latter. *Mansfield* v. *Converse*, 182.

3. An agreement by a creditor to extend the right to redeem land which is mortgaged to him to secure his debt, and not to foreclose the mortgage for a specified time, does not extend the personal liability of his debtor beyond the time at which it would otherwise cease by the statute of limitations. *Ball* v. *Wyeth*, 275.

4. If a corporation which is bound by its charter to keep certain roads and bridges in repair enters into an agreement with the Commonwealth for the exchange of certain lands, and the agreement provides that until such exchange it shall remain bound, as now, to keep the roads and bridges in repair, it is not liable, in an action of contract upon this agreement, for a failure to keep the roads and bridges in repair. *Commonwealth* v. *Boston & Roxbury Mill Corp.* 296.

5. No action lies on a warranty given upon the sale of a horse, the price of which was paid in spirituous liquors which the purchaser could not legally sell. *Howard* v. *Harris*, 297.

6. A written promise to pay to the plaintiff in an action the amount which may be recovered therein within thirty days from final judgment, in consideration of the delivery by the officer to the promisor of the property attached on the writ, may be enforced, although it was made without the request or knowledge of the defendant therein, and the attached property did not belong to him, and was not in his possession, and perished before the recovery of judgment in the action. *Hayes* v. *Kyle*, 300.

7. By a written instrument A. agreed to stock the wharves and yards of B. with coal, wood and bark, and to furnish B. with as much of the same as he could sell at retail, and pay him a specified price for doing the business, giving authority to B. to purchase such kinds and quantities of wood and bark as he might require. B. agreed not to sell or deal in any other coal, wood or bark than that furnished by A. or purchased on his account, and to guarantee the payment for all coal sold by him at retail, and to render to A. monthly accounts, and to credit A. with the same, as cash, at the price previously fixed upon by A. as the selling price, and to accept the drafts of A. for about the regular wholesale market price of similar coal. A. reserved the right to fix the price of coal from time to time, provided that the same should not be above the lowest market price, and it was stipulated that the books of B. should at all times

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be open to the inspection of A. *Held*, that the whole of the coal, wood and bark, together with the proceeds of such of it as had been sold, belonged to A. *Audenried* v. *Betteley*, 302.

8. If a written agreement has been executed by one person only, by which he agreed to deliver to another, upon the formation of a coal company, and when the certificates should have been issued, a certain amount of the stock of the company, and the agreement recites that the person who was to receive the stock agreed, in consideration thereof, to sell a certain amount of the stock of the company at a specified valuation, and collect payment therefor, a declaration in an action against the signer of the agreement is demurrable, which does not allege that there was a consideration for the defendant's promise, or that the company has been formed, the certificates issued, or the stipulated amount of stock sold and payment therefor collected by the plaintiff. *Murdock* v. *Caldwell*, 309.

9. A written agreement in this form: "Borrowed and received of A. two hundred and sixty dollars, which I promise to pay on demand with interest," imports a consideration on its face; and if the defendant, in an action upon it, has introduced evidence tending to show that it was without consideration, the plaintiff may prove that it was given in payment of a debt of a third person, although there is no averment to that effect in the declaration. *Cochran* v. *Duty*, 324.

10. A. and B., who were partners under the firm of A. & Co., contracted with C. for the delivery of certain stock and materials to them. After the delivery of a portion, B. sold his interest in the business and firm to D., who continued the same business, under the same firm, with A., taking from D. a written agreement "to discharge him from all liabilities on account of purchases of stock and materials as one of the original firm of A. & Co." The rest of the stock and materials was thereafter delivered by C., who did not know of the change in the firm, and A. afterwards gave to C. a note signed A. & Co. for a portion of the price, dated back to the time when A. & B. were in partnership. *Held*, that B., upon paying the note and balance of the account, might maintain an action upon the agreement against D., to recover the same. *Nichols* v. *Prince*, 404.

11. A. and B. entered into a written contract, by the terms of which A. agreed to make within one year, for a certain price, one thousand sewing machines for B., using B.'s tools and machinery and all parts of machines already completed and in B.'s possession, and at the completion of the work to leave such odd parts of machines as might be on hand; B. agreed to furnish necessary materials, to expend a certain sum for machinery, and to advance, for A.'s convenience in paying for labor, a certain sum each month, with a further stipulation, in case A. should not realize for his own services as much as fifteen hundred dollars for the year, to pay him enough to make up that sum to him. After eight months' work under this contract, the parties mutually agreed in writing to annul it, A. agreeing to pay for all work done on the machines to a time three weeks prior to the making of the last agreement, and B. agreeing to pay

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for all work done since that time. *Held*, in an action by A. to recover for sums paid by him for work done since the time specified in the last agreement, that B. was not entitled to claim allowance for sums advanced by him from time to time, in pursuance of the original contract, or for articles furnished to A. for use in the construction of the machines. *Curtis* v. *Littlefield*, 570.

See EASEMENT, 3, 4; EQUITY, 6; FRAUDS, STATUTE OF.

CONTRIBUTION.

See MORTGAGE, 3, 7.

CONVERSION.

See ATTACHMENT, 2; REPLEVIN, 4.

CORPORATION.

A payment of corporate debts by a stockholder in a foreign corporation will be deemed to have been voluntary, in the absence of proof that he was legally liable therefor. *Eastman* v. *Crosby*, 206.

See BOND, 1–5; INSURANCE, 1, 2, 10; MANUFACTURING CORPORATION

COSTS.

See ARBITRAMENT AND AWARD, 1–3; MORTGAGE, 18.

CURTESY.

A man has no interest as tenant by the curtesy in land which his wife owns in remainder or reversion, subject to a life estate; and he can convey no title thereto, which will be valid against a subsequent levy thereon of an execution against him and his wife. *Shores* v. *Carley*, 425.

DAMAGES.

In an action to recover for injuries to a horse, sustained in consequence of a defect in a highway, the plaintiff is entitled to recover the diminution, occasioned by the injury, in the market value of the horse at the commencement of the action, and, in addition, such sums as the plaintiff has paid out in reasonable attempts to cure him, with a reasonable compensation for his own services in attempting to cure him, and a reasonable sum as compensation for the loss of the use of the horse while under such treatment; provided that the whole damages allowed do not exceed the value of the horse. *Gillett* v. *Western Railroad Corp.* 560.

See INSOLVENT DEBTORS, 6.

DECEIT.

See FRAUD, 4.

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DEED.

1 If a deed of land, in describing the granted premises, after naming a certain monument, adds, "thence running southerly by land improved by A. to the road," and a straight line to the road, running a little east of south, will include the land improved by A. in the granted premises, while a line running a little south of west, to the corner of the land improved by A., and thence along the line of said land a little east of south to the road, at a point nearly south of the monument, will exclude said land from the granted premises, the latter construction is to be adopted as the true one. *Bond* v. *Fay*, 212.

2. A deed of a certain described lot of land, "together with all the dwelling-house and building, with the appurtenances, situate thereon or thereto belonging. To have and to hold the above granted premises, with the privileges and appurtenances thereto belonging," includes a small lot of land adjoining the granted premises, which is habitually used with the dwelling-house, and is reasonably necessary to be held in connection with it. *Ammidown* v. *Ball*, 293.

3. A deed of a certain described lot of land, with a store thereon, "together with all the rights, easements, privileges and appurtenances thereto belonging, and now had and enjoyed therewith; being the same premises which A. B. conveyed to me," does not include a lot of land in the rear of the described premises, which was not conveyed by A. B. to the grantor, although the grantor owns the same and has built thereon a store connected with the store on the described premises by a covered bridge, and has agreed with the owners of adjoining lots that such rear store shall not be rented or occupied by any person except the owner or occupants of the front store, as an appendage to the same, and that no building shall ever be erected upon such rear lot except of a specified height. *Ammidown* v. *Granite Bank*, 285.

4. If the grantor in a deed describes the granted premises in general terms, and reserves the wood and timber "on said premises, south of the meadow or low land," the reservation includes the wood and timber upon all of the granted premises which lie further to the south than the meadow, and is not limited to that upon the portion of the premises lying directly south of the meadow. *Cronin* v. *Richardson*, 423.

5. A grant of land adjoining a railroad, with the water power of a brook upon said land, running along by the side of the railroad, and the right of making a dam across the brook, and abutting upon the embankment of the railroad, "provided said dam shall be so built as to answer for a street to the railroad, and said street is to be opened three rods wide" across the granted premises to the railroad, and the grantee "is to make the road," is not a grant upon a condition subsequent. *Chapin* v. *Harris*, 594.

See EASEMENT, 4; EQUITY, 3; EVIDENCE, 1; MORTGAGE, 2; WAY, 11.

DEPOSITION.

1. An objection to the form of a certificate upon a deposition is not waived by the presence of the adverse party at the time the deposition was taken, without then making the objection. *Bacon* v. *Rogers*, 146.

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4. A deposition is not to be wholly rejected for the omission of the witness to answer a particular interrogatory fully, unless his answer is so imperfect or evasive as to induce the court to believe that he wilfully kept back material facts within his knowledge. *Stratford* v. *Ames*, 577.

See PRACTICE, 6.

DISSEISIN.

See MORTGAGE, 1; WRIT OF ENTRY, 3.

DIVORCE.

See MARRIAGE AND DIVORCE; PRACTICE, 5.

DOWER.

1. A woman who, to release dower, has joined with her husband in a mortgage of land cannot upon his death maintain a writ of dower against the mortgagee or his assignee in possession. *Farwell* v. *Cotting*, 211.
2. If land is conveyed by a deed of warranty, subject to a mortgage, the grantee does not thereby undertake nor become bound to pay off the mortgage; and if he does so, and takes an assignment thereof to himself, the mortgage is not thereby discharged, nor can the widow of the grantor maintain a writ of dower against him. *Strong* v. *Converse*, 557.

DURESS.

See EVIDENCE, 4.

EASEMENT.

1. A way over other land of the grantor in a deed may pass as appurtenant to the land granted, although there are no insuperable physical obstacles to prevent access by another way, if such other way cannot be made without unreasonable labor and expense; and, in determining this question, a jury may consider the comparative value of the land and the probable cost of such a way. *Pettingill* v. *Porter*, 1.
2. If no permanent restriction upon the use of an estate is created by deed, a court of equity will not imply one under an alleged independent agreement, unless such agreement is clearly established. *Hubbell* v. *Warren*, 173.
3. A simple agreement between the owners of adjacent estates for the erection of buildings thereon in a uniform manner, and at a certain distance from the street, does not by implication require that the buildings shall thereafter remain in the same position or of the same size or shape as when erected. *Ib.*
4. If the owner of two adjacent lots of land conveys one of them subject to a condition that the buildings to be erected thereon shall be set back a certain distance from the street, and with a warranty that the premises are free from all incumbrances made or suffered by him, a previous mutual oral agreement between the grantor and grantee that they will set back the buildings to be erected by them a greater distance from the street cannot be enforced by one of them in equity. *Ib.*

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ENLISTMENT.

See SOLDIER.

EQUITY.

1. If a bill in equity is brought in behalf of the plaintiff and such others having a like interest as may come in to prosecute the suit, and no others come in, the plaintiff, in order to maintain his bill, must show that he is himself entitled to equitable relief. *Hubbell* v. *Warren*, 173.

2. If two tenants in common of personal property have used the same in the prosecution of business, under an agreement as to the compensation of one of them, who was "to superintend the establishment," and who survives the other, the administrator of the deceased tenant in common may maintain a bill in equity to compel the survivor to exhibit an account of the transactions under said agreement, and of the manner in which the business was carried on. *Field* v. *Craig*, 357.

3. A grantor of land cannot maintain a bill in equity to reform his deed, by inserting therein a reservation which was included in the oral agreement between the parties, if the omission to insert it does not appear to have occurred through fraud, accident or mistake, but in consequence of his relying upon the promise of the grantee to carry out the oral agreement. Nor, in such case, can relief be granted to the plaintiff on the ground that the defendant's refusal to perform his promise is fraudulent. *Andrew* v. *Spurr*, 412.

4. A bill in equity does not lie to correct an error in the report of commissioners appointed to make partition of the real estate of a deceased person, thirteen years after its acceptance and confirmation by the probate court, especially if such bill does not allege that the defendants, who claim title to the premises in dispute as purchasers, knew of the error at the time when they acquired their title. *Hathaway* v. *Thayer*, 421.

5. A bill in equity brought by an assignee of an insolvent debtor against several defendants to set aside mortgages of real estate executed to each of them separately, on the same day, by the insolvent debtor, in violation of the insolvent laws, and also other mortgages of other real estate executed by him to a portion of the defendants separately, on another day, in violation of the insolvent laws, is multifarious. *Metcalf* v. *Cady*, 587.

6. A bill in equity does not lie, in favor of an assignee of an insolvent debtor, to set aside several mortgages of the same real estate, each of which contained a reference to the others, and was executed by the debtor on the same day to different creditors, in violation of the insolvent laws. *Ib.*

7. If the owners of lands agree in writing, for a valuable consideration, to pay to another person a certain sum "out of the proceeds of the sale of said lands, if the same shall be sold, or, if the lands shall not be sold, and a company shall be formed for working the mines thereon," then to convey to him stock to that amount, "it being understood and agreed by and between the parties hereto that the foregoing amount, whether of cash or stock, is to be a charge on the joint estate" of the owners, a charge in the nature of a lien upon the lands is

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thereby created, which may be enforced in equity, upon a proper case being made, against all who take a title to the lands with notice. *Pinch* v. *Anthony*, 536.

See GUARDIAN AND WARD, 1, 2; JUDGMENT, 2; MARRIED WOMAN, 1–3; PARTNERSHIP 5.

ERROR.

1. After a verdict for the demandant in a writ of entry, for a described portion of the demanded premises, and judgment thereon, a writ of error to reverse the judgment will not be sustained on the ground that there are no sufficient monuments or other means to enable the parties accurately to ascertain the land described in the verdict. *Silloway* v. *Hale*, 61.
2. A bequest of a sum of money to be divided equally among various persons is a separate bequest of a proportionate share of the whole sum to each; and a writ of error lies to reverse a judgment recovered by them jointly for the whole sum. *Whiting* v. *Cook*, 63.
3. Upon a writ of error to reverse a judgment recovered by several persons jointly who were not entitled to maintain a joint action, the defendants in error cannot be allowed to amend by striking out the names of all but one of them; especially if there are no means of determining from the record the amount for which any one of them would be entitled to recover judgment. *Ib.*

ESTOPPEL.

See BOND, 3.

EVIDENCE.

1. The recitals in a recent deed, as to the ownership and boundaries of land adjoining that which is conveyed therein, are not admissible in evidence against one who has subsequently become the owner of the granted premises, and who claims a right of way over the adjoining land, as appurtenant to other land held by him under a prior deed from the same grantor; although both the grantor and grantee are dead. *Pettingill* v. *Porter*, 1.
2. The declaration of a person made upon land, while he was in possession thereof under an undisputed claim of title, that his line extended to a certain boundary which he pointed out at the time, is admissible in evidence, after his decease, in favor of those who claim under him, on the trial of a question arising subsequently concerning the boundary line of the same tract of land. *Wood* v. *Foster*, 24.
3. Mere declarations of one in possession of land, in favor of his own title, are inadmissible. *Morrill* v. *Titcomb*, 100.
4. If it is in controversy whether a release of personal property has been obtained through duress, by means of an arrest under a complaint and warrant upon a criminal charge, the declarations of the person arrested, prior to the making of the complaint, are competent evidence against him, for the purpose of showing probable cause for the charge. *Hackett* v. *King*, 144.

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5. In an action against a gas light company to recover damages for an injury to the plaintiff's health caused by an escape of gas from a main pipe in a public street, from which it passed through various sewers and drains into the cellar of the house and thence into the house occupied by the plaintiff, evidence is competent to show that all the other persons living in the same house, who had been in good health before the time complained of, afterwards became ill, for the purpose of showing the effect of the gas upon others who inhaled it at the same time with the plaintiff; and it is immaterial whether the injury was caused by inhaling gas of the defendants, or other gases from the sewers and drains which it set in motion, provided the plaintiff was not guilty of negligence, and the defendants were guilty of negligence. *Hunt* v. *Lowell Gas Light Co.* 169.

6. There is no established form for questions to experts in this commonwealth, and any question may be proper which will elicit their opinions as to the matters of science or skill which are in controversy, and at the same time exclude their opinion as to the effect of the evidence in establishing controverted facts. *Ib.*

7. The testimony of experts is incompetent to show whether the placing of wet staves upon the outside of an arch, in which a fire is kindled, is a safe and prudent method of drying them. *White* v. *Ballou*, 408.

8. If the price to be paid for the use of a horse and wagon is in controversy, one who has bought, sold and used similar ones may testify to his opinion of the value of such use. *Brady* v. *Brady*, 101.

9. In an action against a town to recover damages for an injury sustained by reason of a defective bridge, no exception lies to the exclusion of a question put by the defendants, as to how the bridge compared, on the day of the accident, in respect to its safety and state of repair, with other bridges of like character on roads of like amount of travel. *Bliss* v. *Inhabitants of Wilbraham*, 564.

10. If, in an action to recover the value of the labor of the plaintiff's intestate for several years before his death, the defendant has introduced evidence to show that by reason of confirmed intemperance and a chronic bodily disease his labor was not worth more than his board and clothing, and such small sums of money as were furnished to him for holidays, evidence is inadmissible in reply to show the amount and value of his labor the year before he commenced working for the defendant, and that there was no visible change for the worse in his health and habits thereafter. *Graves* v. *Jacobs*, 141.

11. Evidence is admissible to show that a person has for several years been living at a rate of expenditure far beyond his apparent means, as tending to confirm other evidence of dishonesty in appropriating the property of his employer. *Hackett* v. *King*, 144.

12. The rejection of a photographic view of premises, the boundaries of which are in dispute, and upon which a trespass is alleged to have been committed by placing rocks and rubbish thereon, furnishes no ground of exception, if the same is offered simply as a "chalk representation," without being verified by

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the oath of the photographer, although the evidence of other persons is offered to show its correctness. *Hollenbeck* v. *Rowley*, 473.

13. In an action to recover for particular services and articles, a witness for the defendant cannot be allowed to testify that the plaintiff once presented to him a bill against the defendant for the same services and articles, charged at a less amount, without producing the bill, unless some reason is shown for the failure to produce it. *Stratford* v. *Ames*, 577.

14. The admission of immaterial evidence to prove a conceded point furnishes no ground for a new trial. *Sibley* v. *Leffingwell*, 584.

15. If there is direct evidence that an attaching creditor, who has levied his execution upon a portion of a messuage, had actual notice, prior to his attachment, of an unrecorded deed of "the place," evidence that the portion upon which the execution was levied was inclosed with the rest of the premises and used for a garden is competent, for the purpose of showing that he knew that the deed covered the whole of the messuage. *Ib.*

16. It is incumbent upon one who seeks to establish a title under an unrecorded deed, against an attachment and levy of an execution, to prove that the attaching creditor had actual notice, at the time of his attachment, that there was then a subsisting deed of the premises; and if the judge so instructs the jury, no exception lies to his refusal to instruct them that it was necessary to prove actual notice of a valid deed, or that the attaching creditor sought to acquire a title under his attachment by fraud. *Ib.*

17. Proof of open occupation, possession and cultivation of land by one who has an unrecorded deed thereof, though not sufficient to warrant the inference that a third person has actual notice of such deed, is competent for the consideration of the jury, in connection with direct evidence that he had such actual notice. *Ib.*

See ATTORNEY; BOND, 4; COLLATERAL SECURITY, 2; CONTRACT, 9; DEPOSITION; EXECUTORS AND ADMINISTRATORS, 5; FRAUD, 2, 3; PAUPER, 2; PRINCIPAL AND AGENT, 1; PROMISSORY NOTES, 2; SOLDIER, 1–3; WAY, 3, 4; WITNESS; WRIT OF ENTRY, 1, 2.

EXCEPTIONS.

Exceptions will not be sustained which simply show that incompetent declarations were admitted in evidence, without showing what the declarations were. *Hackett* v. *King*, 144.

EXECUTION.

See ATTACHMENT; SALE, 2.

EXECUTORS AND ADMINISTRATORS.

1. The receipt, by an administrator, of the avails of real estate of his intestate, sold for payment of debts after the expiration of two years from the date of his bond, is not a receipt of new assets which will authorize a creditor thereafter to commence proceedings against him to recover his debt, under Gen Sts. c. 97, § 6. *Chenery* v. *Webster*, 76.

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2. It is culpable neglect, within the meaning of St. 1861, c. 174, § 2, not to bring a suit against an administrator within the time limited by law, if the party having the claim has knowledge of the existence of the debt, of the statute limitation, and of the time when it will expire, and no fraud or imposition has been practised upon him, and the delay is not caused by accident or mistake. *Waltham Bank* v. *Wright*, 121.

3. If ancillary administration is taken out in another state upon the estate there of a deceased citizen of Massachusetts, a judgment there rendered, establishing a claim against the estate, is not binding here, and cannot be proved against the estate here; nor can the creditor establish his claim here against the executor, or against the legatees, to compel them to refund money paid to them by the executor, after the expiration of the time limited for the presentation of claims against executors, although the judgment was rendered after the expiration of such time. *Low* v. *Bartlett*, 259.

4. A bond without surety, given by an executor and approved by the judge of probate, without notice to creditors, is not such a bond as the statutes of this commonwealth require; and the statute of limitations against executors will not begin to run from the filing of such a bond. *Abercrombie* v. *Sheldon*, 532.

5. In an action against an executor to recover a note of long standing, signed by his testator, payment of the note cannot be proved by evidence that it was the testator's habit to pay his debts promptly, or that another person had agreed to pay them for him, or that he made a list of his debts in which the note in question was not included. *Ib.*

See MORTGAGE, 5.

FORCIBLE ENTRY AND DETAINER.

If the defendant in a writ of forcible entry and detainer seeks to justify his possession under the authority of some other person than the plaintiff, the burden is on him to prove the title of such person. *Hogan* v. *Harley*, 525.

FRAUD.

1. If goods have been obtained from their owner by fraud and false pretences, the burden of proof is upon one who claims under a subsequent purchase to show that he was a purchaser for a valuable consideration without notice. *Easter* v. *Allen*, 7.

2. In an action of replevin of goods obtained from their owner without payment and by fraud and false pretences, against one who claims under a subsequent purchase, the intent to defraud cannot be shown by evidence of declarations, not relied upon as a part of the false pretences by which the goods were obtained, but made, after the completion of that transaction, by a third person to whom the plaintiff was referred by the vendee for information, and in reply to inquiries put by the plaintiff; nor can such intent to defraud be shown by evidence that the plaintiff found on inquiry that a third person whom that vendee subsequently introduced to him as doing business at a particular place, did not do business there. *Ib.*

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3. In an action of replevin of goods obtained from their owner by fraud and false pretences against one who claims under a subsequent purchase, it may be shown by cross-examination of the plaintiff that a few days before the trial he made a complaint against the person who obtained the goods from him for obtaining them under false pretences, and caused him to be arrested on the morning of the trial. *Ib.*

4. An action for deceit in the sale of real estate cannot be sustained by proof of fraudulent misrepresentations as to the price paid for it by the vendor *Hemmer* v. *Cooper*, 334.

See LIMITATIONS; MORTGAGE, 17.

FRAUDS, STATUTE OF.

1. An action may be maintained upon an oral promise to pay for land, at a certain sum by the acre, after the delivery and acceptance of a deed thereof. *Nutting* v. *Dickinson*, 540.

2. If persons who are negotiating together for the purchase and sale of land orally agree to leave the price to be determined by arbitrators, who fix a sum in gross, and the parties afterwards agree to ascertain and abide by the estimate of the arbitrators by the acre, and a deed is accordingly executed, delivered and accepted, with the understanding by both parties that the price is to depend on the estimate of the arbitrators by the acre, and the purchaser pays a sum which he asserts is all that the land comes to, by the appraisement, but which the vendor says is not sufficient, the latter may maintain an action to recover such sum as shall be found, upon a measurement of the land, to be due by the appraisement. *Ib.*

3. No action lies to charge a person upon or by reason of false oral assurances concerning the credit and ability of a corporation of which he was the treasurer, made in order to induce the plaintiff to receive a note of the corporation, signed by him as treasurer. *McKinney* v. *Whiting*, 207.

4. A. wrote to B. as follows: "Say how many white, colored and woollen rags you have on hand, and your prices for them." B. replied: "I have about a ton each, white and colored rags, and my prices are three and one-half cents for colored and seven cents for white. I have some hen and turkey feathers and some old glass which I should like to sell." A. replied: "I will take the rags at the price you name." B. made no written reply, but there was evidence tending to show a subsequent oral agreement by him to deliver the rags, which he afterwards refused to do. *Held*, that A. could not maintain an action against B. for the non-delivery. *Smith* v. *Gowdy*, 566.

GAS LIGHT COMPANY.

See EVIDENCE, 5.

GOVERNOR.

See TAXES, 3.

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GUARDIAN AND WARD.

1. If a guardian who holds shares in a corporation, which were issued to him in his official capacity, improperly assigns them to secure a private creditor, who takes them with knowledge of the facts, the guardian's successor in office may maintain a bill in equity to obtain a transfer thereof to himself. But if he assigns other shares, which belong to his ward, but which were issued to him without expressing his official capacity, to one who takes them for value, without notice, his successor cannot maintain a bill in equity to obtain a transfer thereof to himself. *Atkinson* v. *Atkinson*, 15.

2. The allowance by a judge of probate of a guardian's account, in which the guardian charged himself with the appraised value of certain shares in a corporation, belonging to his ward, and the recovery of judgment upon his bond for the amount of moneys remaining in his hands at the time of his ceasing to be guardian, are no bar to a bill in equity by his successor to obtain a transfer of the shares, if their value was not included in the judgment; although in a specification of particulars of the plaintiff's demand in the action in which the judgment was recovered, the balance found due by the probate account was claimed as cash in his hands. *Ib.*

3. A guardian who has sold real estate of his ward under a license granted on the ground that it would be for the benefit of the ward that it should be sold and the proceeds put out at interest or invested in some productive stock, has no right to apply such proceeds towards the support of the ward, unless a necessity therefor, arising after the granting of the license, is clearly established. *Strong* v. *Moe*, 125.

4. It is not reasonable care and prudence in a guardian to invest his ward's money in the note of a single person or a single firm, in active business, without security, unless extraordinary circumstances are shown to justify such an investment; and if a loss occurs in consequence thereof, he will be held responsible for it. *Clark* v. *Garfield*, 427.

HOMESTEAD.

1. A right of homestead, acquired under *St.* 1855, *c.* 238, is not lost by a removal of the householder with his family therefrom into another house owned by him, if it does not appear that he intended permanently to abandon the estate from which he removed. *Lazell* v. *Lazell*, 575.

2. An estate of homestead may exist, under *St.* 1855, *c.* 238, in a country hotel. *Ib.*

3. The probate court has no jurisdiction to set out an estate of homestead, if the right to it is disputed by the heirs or devisees. *Ib.*

HUSBAND AND WIFE.

1. A deputy sheriff cannot, by virtue of an execution, sell and convey an equity of redemption of land of the judgment debtor to the debtor's wife; but the title remains in the husband, notwithstanding such conveyance. *Stetson* v *O'Sullivan*, 321.

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2. If upon such sale and conveyance the debtor and his wife mortgage the premises to secure their joint note for the price of the equity, she is not liable upon the note. Upon payment of the sums secured by the mortgages upon the land, the title is in the husband. And if such payment is made by her out of her separate funds, and it does not appear that the land is worth more than the sums so paid by her, a conveyance thereof by him to her, through the intervention of a third person, within a few days prior to his going into insolvency, may be sustained, if not shown to have been actually fraudulent. *Ib.*

See CURTESY; INSOLVENT DEBTORS, 4; MARRIED WOMAN; TRESPASS, 3.

INDICTMENT.

If the defendant in an indictment pleads a former conviction, and also that he is not guilty, he cannot be put to trial, against his objection, upon the last plea, until the first has been decided against him; and if he is put to trial upon both pleas at once, and is found guilty, under a ruling of the judge that the evidence produced by him does not sustain the plea of former conviction, he will be entitled to a new trial, although the evidence did not sustain his plea of former conviction. *Commonwealth* v. *Merrill*, 545.

See SPIRITUOUS AND INTOXICATING LIQUORS, 3.

INSANITY.

See PRACTICE, 5.

INSOLVENT DEBTORS.

1. A messenger in insolvency has no right to take into his possession personal property of the debtor which is under a valid attachment. *Cutler* v. *Gay*, 184.
2. If, after an attachment of mortgaged goods, the mortgagor goes into insolvency, it is the duty of the attaching officer to deliver them to the mortgagee, and not to the assignee of the mortgagor. *Howe* v. *Bartlett*, 20.
3. If the validity of a mortgage made by an insolvent debtor upon his homestead to secure a preëxisting debt, within six months previous to the commencement of proceedings in insolvency, is questioned on the ground that it was not made in the usual and ordinary course of his business, and the evidence simply shows that he was a millwright, and had no other occupation or business, the jury should be instructed that the mortgage was not made in the usual and ordinary course of his business. *Nary* v. *Merrill*, 451.
4. Promissory notes may be proved against the estate of the maker in insolvency, although the beneficial interest in them has become vested in his wife, if the legal title to them has not been transferred to her. *Stearns* v. *Bullens*, 581.
5. If the holders of a promissory note have been allowed to make a double proof, against the insolvent estate of the maker and also of the indorser, and a second dividend has been declared from one of these estates, which, with a dividend already received from each of them, amounts to more than the claim as proved, though less than the claim with interest, they are not entitled to

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receive any more of such second dividend than will satisfy the amount of their claim as proved, until the other creditors have also received the full amount of their claims as proved. *Blake* v. *Ames*, 318.

6. A discharge in insolvency is a bar to the recovery of damages for the conversion of goods, though such damages are alleged by way of aggravation in an action of tort for breaking and entering the plaintiff's close. *Bickford* v. *Barnard*, 314.

See ATTACHMENT, 2; PRINCIPAL AND AGENT, 2, 3; REPLEVIN, 1; WRIT OF ENTRY, 5.

INSURANCE.

1. A vote by the directors of a mutual insurance company, cancelling all outstanding policies, with a provision that the cancellation shall take effect on a certain day, does not take away their authority after that day to lay a necessary assessment upon the deposit notes. *Fayette Mut. Fire Ins. Co.* v. *Fuller*, 27.

2. If no mode of calling meetings of the directors of a mutual insurance company is prescribed in the by-laws, except that the secretary shall notify all such meetings, and if the by-laws do not require that the object of such meetings shall be stated in the notices, an assessment upon deposit notes may be laid at a meeting notified by the secretary, by order of the president, although it is not attended by the president, and although the object of the meeting was not stated in the notices. *Ib.*

3. A statement of the condition of a mutual insurance company, prepared upon making an assessment, which shows all the separate items of liabilities for which the assessment is made, is sufficient, under Gen. Sts. *c.* 58, § 54, although in summing up the aggregate of them other items for estimated expenses, return premiums and losses in collecting are included. *Ib.*

4. If the by-laws of a mutual insurance company do not provide that the deposit notes shall be deemed to be absolute funds of the company, an assessment may be laid before the collection of them has been made or ordered. *Ib.*

5. Payment of an assessment upon the deposit notes of a mutual insurance company cannot be resisted on the ground of the omission to assess certain notes liable to assessment, if it appears that all the notes which were in force during the time in question were assessed except a very small number, which had been adjusted and cancelled by officers of the company before making the assessment, and which were of so small an amount as not materially to increase the assessment upon the remainder. *Ib.*

6. If a mutual insurance company have issued policies for terms varying from less than one year to five years, and in making an assessment upon the deposit notes have reduced those which were given upon policies for more than one year to "one year notes," by assuming as the basis of such assessment such a proportion of the amount expressed upon their face as is found by an auditor, whose report is taken as an agreed statement of facts, to be "fair and reasonable, and as near to perfect equality as can be approximated in such

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calculations," this court will not, upon a hearing upon the agreed statement of facts, declare the assessment void, as being unequal. *Ib.*

7. If the by-laws of a mutual insurance company provide that policies may be surrendered at any time to be cancelled, and that the insured shall receive the return premium in accordance with a certain table, and, after an injunction has been laid upon the company, the directors, under the authority of this court, have duly cancelled all the outstanding policies, the return premiums due to the policy holders are just claims against the company, within the meaning of Gen. Sts. *c.* 58, § 48, and may be included among the items of liability, in making an assessment upon the deposit notes. *Ib.*

8. A by-law of an insurance company, which provides that a special meeting shall be called by the president, or in his absence by the secretary, on application made to them in writing by ten members, does not preclude the directors from calling special meetings without such application. *Citizens' Mut. Fire Ins. Co.* v. *Sortwell*, 217.

9. One who becomes a member of a mutual insurance company after it has practically adopted the provisions of *St.* 1849, *c.* 104, § 2, authorizing the property insured to be divided into classes, and acted thereon for several years, cannot object, in an action to recover an assessment upon his deposit note, that the same were not formally adopted at a meeting regularly called for that purpose. *Ib.*

10. If the records of a corporation show that a meeting was duly called, a proper notice given, and that business was transacted at it, the presumption is that a quorum of members was present, unless the contrary clearly appears. *Ib.*

11. The directors of a mutual insurance company may divide the property insured by them into classes, under *St.* 1849, *c.* 104, § 2, from time to time, as the policies are issued; and after the full amount of one hundred thousand dollars is subscribed to be insured in each class, the policies will take effect, and one who becomes insured thereafter cannot object, in an action to recover an assessment upon his deposit note, that the proceedings were irregular. *Ib.*

12. Subscriptions for insurance in a particular class of risks of a mutual insurance company, which are made a short time before the adoption by the company of the provisions of *St.* 1849, *c.* 104, § 2, may, in an action to recover an assessment upon a deposit note of a subsequent member, after the lapse of ten years, without objection from the company or the persons insured, be taken as a part of the sum required by that statute to be subscribed, before the issuing of policies. *Ib.*

13. A statement in the instructions issued by the directors of a mutual insurance company to agents, that distilleries are not insurable, does not preclude the company from making a valid contract of insurance upon a distillery. *Ib.*

14. A time policy of insurance on a vessel contained an extension clause, as follows: "If on a passage at the end of the term, the risk to continue at *pro rata* premium until arrival at port of destination." At the end of the term the vessel was on a passage to Woosung, under a charter party which provided that, "on arrival at Woosung, the captain shall take his orders from the chief

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of the French marine service at that port, who will indicate to him within twenty-four hours if he is to discharge at Woosung, or go on to Chusan, and that after the arrival of the ship at Woosung the marine might keep her as long as it might wish, and send her to such safe and accessible port as it might judge desirable." *Held*, that if no orders to go to another port were received within twenty-four hours after notice to the chief of the French marine service at Woosung of her arrival there, that should be regarded as her port of destination, within the meaning of the extension clause. *Wales* v. *China Mut. Ins. Co.* 380.

JUDGMENT.

1 If goods have been taken by replevin from an attaching officer, a judgment in favor of the plaintiff in the replevin suit is conclusive evidence of title in him, as against the attaching plaintiff, and also as against a person who, after the replevin, and having notice thereof, has caused a further attachment of the goods to be made, under Gen. Sts. *c.* 123, §§ 35–39; and it is immaterial that the second attaching plaintiff erroneously supposed that the first attaching plaintiff would defend the replevin suit. *Carlton* v. *Davis*, 94.

2. A final decree of the supreme court of the United States, dismissing a bill in equity after a hearing, is a bar to a subsequent suit in equity in this court for the same cause, between the same parties, although the record shows that such decree was passed by a divided court. *Durant* v. *Essex Co.* 103.

3. If the declaration in an action contains but one count, setting forth various trespasses upon real estate, accompanied by particular acts of injury, a judgment therein for a portion of such acts is a bar to a subsequent action to recover damages for others of the same acts. *Goodrich* v. *Yale*, 454.

4. In an action on a judgment rendered in another state, on which an execution has there been returned satisfied in part only, the plaintiff can recover no more than the sum for which it was returned unsatisfied, although damages have been recovered against the officer who served it, for seizing and selling thereon property not liable thereto, the avails of which sale were included in the sum for which he returned it satisfied, and although by the law of the state in which the judgment was rendered (as in this commonwealth) the plaintiff might, for such cause, obtain a new execution, on *scire facias*. *Arnold* v. *Rorahack*, 429.

See GUARDIAN AND WARD, 2; POOR DEBTORS, 3; SHERIFF.

JURISDICTION.

See HOMESTEAD, 3; RECOGNIZANCE, 1.

LACHES.

See EQUITY, 4; EXECUTORS AND ADMINISTRATORS, 2.

LANDLORD AND TENANT.

A tenant at will who quits and delivers up a demised tenement by the express oral consent of his landlord is not thereafter liable for rent, although he does

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not give a written notice under the statute, or return the whole number of keys belonging to the tenement. *Farson* v. *Goodale*, 202.

LEASE.

If a lease of buildings contains a written clause providing that they "are to be kept in repair and maintained in good condition by the lessee," and printed clauses providing that at the end of the term the lessee will quit and deliver up the premises "in as good order and condition, (reasonable use and wearing thereof, fire and other unavoidable casualties, excepted,) as the same now are or may be put into" by the lessor, and that the lessee shall keep the buildings insured against loss by fire, in a specified sum payable to the lessor, the lessee is not liable to repair injuries which occur through ordinary wear, or fire or other unavoidable casualties. *Ball* v. *Wyeth*, 275.

LEGACY.

See ERROR, 2.

LEGITIMACY.

See PAUPER, 3.

LICENSE.

See PLEADING, 3; SPIRITUOUS AND INTOXICATING LIQUORS, 2; TRESPASS, 2.

LICENSE TO SELL REAL ESTATE.

See GUARDIAN AND WARD, 3.

LIEN.

See EQUITY, 7; SHIP.

LIMITATIONS.

The omission to disclose a trespass upon real real estate to the owner, if there is no fiduciary relation between the parties and the owner has the means of discovering the facts and nothing has been done to prevent him from discovering them, is not such a fraudulent concealment of the cause of action as will prevent the operation of the statute of limitations, under Gen. Sts. *c.* 155, § 12. *Nudd* v. *Hamblin*, 130.

See CONTRACT, 3; EXECUTORS AND ADMINISTRATORS, 1–4.

MANCHESTER.

The colonial grant of 1640, taken in connection with subsequent proceedings in 1642 and 1645, is sufficient to show that the title to the beach which was included therein vested in the town of Manchester; there being no evidence that the upland adjoining the beach was granted to any individual, prior to the colonial ordinance of 1647. *Tappan* v. *Burnham*, 65.

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MANUFACTURING CORPORATION.

The *St.* of 1862, *c.* 218, § 3, providing that no stockholder or officer in a manufacturing corporation shall be held liable for its debts or contracts unless a judgment is recovered against it, &c., applies to manufacturing corporations organized under general laws, as well as to those which have special charters. *Peele* v. *Phillips*, 86.

MARRIAGE AND DIVORCE.

If a married woman leaves her husband with his consent, and remains absent five years, this is not such a desertion as will entitle him to a divorce. *Lea* v. *Lea*, 418.

MARRIED WOMAN.

1. A bill in equity lies to enforce payment out of the separate estate of a married woman, so far as she has the right of disposal thereof, of a bond given by her for the price of land conveyed to her to her sole and separate use, provided that no effectual remedy exists at law. And the creditor is not confined to collateral security held by him for the bond. *Rogers* v. *Ward*, 387.

2. Such bill need not set out any specific estate or property belonging to the defendant in her own right, but may allege generally that she is possessed of property to her sole and separate use, and subject to her disposal, which is chargeable with the payment of the bond. *Ib.*

3. The fact that the bond was given before the enactment of the statute conferring full equity jurisdiction upon this court is immaterial. *Ib.*

See HUSBAND AND WIFE; RECOGNIZANCE, 2; WILL, 3.

MECHANICS' LIEN.

1. If labor is done in the erection of a building, under a contract with one who has contracted with the owner for the erection thereof, and no lien exists for such labor at the time when it is done, a subsequent rescinding of the contract will not give a lien therefor against the owner. But a lien may be enforced for labor done in the erection of the building by a person employed by such sub-contractor. *Clark* v. *Kingsley*, 543.

2. If labor and materials have been furnished and used in the erection of a building, under an entire contract, with no stipulation for any separate price for either, and there is no mechanic's lien for the whole, there can be none for any part. *Graves* v. *Bemis*, 573.

3. A mechanic's lien is not defeated by his including in his statement, as a part of his claim for labor and materials "in building and erecting a house," items of charge for labor and materials in building a fence and other structures which were included in the same bargain, provided he honestly supposed he had a lien therefor, and a right to claim it in that manner. *Hubbard* v. *Brown*, 590.

4. If, after a contract for building a house and structures connected therewith has been substantially performed, and a bill rendered for the work done under

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the same, further work is done, which the proper performance of the contract calls for, and not for the purpose of fixing a later date from which to compute the time allowed by statute for filing a statement to enforce a mechanic's lien, the time of performing such further labor may be taken as such date. *Ib.*

MILITARY LAW.

See SOLDIER, 1, 2.

MORTGAGE.

1. Exclusive possession of land by a mortgagor, with a claim of exclusive ownership, does not in itself amount to a disseisin of the mortgagee, so as to invalidate a transfer of the mortgage title or prevent the valid execution of a power of sale contained in the mortgage. *Sheridan* v. *Welch*, 166.
2. The title of a mortgagee to land may be conveyed by a deed of release duly executed and recorded, to one who has no notice of a prior unrecorded assignment of the mortgage. *Welch* v. *Priest*, 165.
3. If the owner of land which is subject to a mortgage conveys a portion thereof the value of which is more than sufficient to pay the mortgage debt, with a provision in the deed that the purchaser shall assume and pay the whole of the same, and afterwards conveys the residue of the lot with the understanding that the mortgage is to be paid by the former purchaser, and the mortgagee subsequently takes a new mortgage upon the portion of the lot first conveyed, with notice, the purchaser of the second lot may maintain a bill in equity to redeem the same without contribution towards the debt secured by the first mortgage. *Welch* v. *Beers*, 151.
4. A power of sale contained in a mortgage of real estate may be executed after the mortgagor's death. *Varnum* v. *Meserve*, 158.
5. If such power of sale, so executed, provides that the surplus of the proceeds, after payment of the debts and expenses, shall be paid to the mortgagor or his assigns, his executor may maintain an action therefor, although the mortgagor by will devised the land to others; and, upon recovery of it, will hold the same in trust, first, to the use of the widow, so far as she may be entitled thereto, in preference to creditors; secondly, for the payment of debts; and thirdly, to the uses of the will. *Ib.*
6. If such power provides that the mortgagee may retain all costs and expenses of the sale, he may retain a reasonable sum paid for legal advice respecting it, and also for his own time and trouble. *Ib.*
7. One who takes a deed of warranty of land, which is duly recorded, and afterwards takes an assignment of a prior mortgage upon the same and another lot, may enforce the mortgage for its full amount upon such other lot, against the mortgagor or his subsequent grantee. And the fact that such grantee has become the assignee of a subsequent mortgage upon such other lot is immaterial. *Kilborn* v. *Robbins*, 466.
8. Proof of a purchase of land, with full covenants of warranty, for less than its value, is no proof that the purchaser undertook to discharge a mortgage

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thereon, of the existence of which he does not appear to have had actual notice. *Ib.*

9. If a purchaser of land, with full covenants of warranty, afterwards takes an assignment of a prior mortgage upon the same and another lot, and the mortgagor afterwards conveys the other lot to one who takes possession thereof, and the assignee of the mortgage afterwards demands of such grantee the payment of the full amount of the face of the debt secured thereby, and payment is refused, and the assignee of the mortgage afterwards fails to comply with a request for an account of the money due upon his mortgage, and of the rents and profits of the mortgaged premises, and of the moneys paid for taxes, repairs and improvements thereon, and various other particulars relating to the same, and also omits for several years to renew the demand for payment of his mortgage debt, he is not thereby estopped to enforce his mortgage against such grantee, or one who has taken a title under him with notice of all the facts. *Ib.*

10. If a deed of land contains an express stipulation that the grantee shall assume and pay a debt secured by a mortgage existing thereon, a payment of such debt in pursuance of such stipulation, and a discharge of the mortgagor therefrom, will operate as a discharge of the mortgage. *Ib.*

11. A second mortgagee of land may maintain an action to foreclose his mortgage against one who holds the first mortgage and also the equity of redemption. *Ib.*

12. If a suit to foreclose a mortgage has been instituted, this court will not by injunction restrain the prosecution of it, although the holder of the equity of redemption offers in his bill to redeem. *Ib.*

13. An entry by a mortgagee upon mortgaged premises, made, certified and recorded as provided in Rev. Sts. *c.* 107, § 2, will have the effect to foreclose the mortgage, after the expiration of three years, although the entry was purposely made in secret. *Ellis* v. *Drake*, 161.

14. If, during the pendency of an action to foreclose a mortgage of land, the mortgagor leases and delivers possession of a portion of the mortgaged premises to a tenant, who retains the actual possession thereof under a claim of right, by virtue of certain provisions of the mortgage, after formal possession has been delivered to the mortgagee upon the execution recovered in his suit, and it is afterwards adjudged, in a writ of entry brought to try the title, that the mortgagee is entitled to possession as against such tenant, he may recover damages for rents and profits from the time when the formal possession was delivered to him, and is not limited to the time of the commencement of his action. *Haven* v. *Adams*, 363.

15. Such tenant, having taken his title *pendente lite*, cannot be allowed compensation for any buildings or improvements made or erected on the premises by him, although he had reason to believe his title to be good; but damages should be assessed for the rents and profits of such buildings and improvements, as well as of the land. *Ib.*

16. The Gen. Sts. *c.* 134, §§ 18, 19, allowing compensation to tenants in real

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actions for buildings or improvements made or erected on the premises, under certain circumstances, are not applicable to the case of buildings or improvements made or erected by a mortgagor or any person claiming under him. *Ib.*

17. If a mortgage of real estate has not been discharged, but the mortgagor has obtained possession of the same with the note which it was given to secure by fraudulently inducing the mortgagee to accept in payment of the note other securities which are worthless, the latter may maintain an action to foreclose the mortgage against one who has purchased a title to the premises of the mortgagor in ignorance of the transaction between him and the mortgagee; although such purchaser has paid money to discharge a new mortgage upon the premises executed by the mortgagor to one who took the same relying in good faith upon the fraudulent payment to the original mortgagee. *Grimes* v. *Kimball*, 153.

18. If a mortgage of real estate, executed by a railroad company to trustees to secure the payment of certain bonds therein described, with semi-annual interest, provides that in default of payment the trustees may enter into and take possession of the premises, and "by themselves, their agents or substitutes, have, use and enjoy the same, making from time to time all needful repairs, alterations or additions thereto, and, after deducting the expenses of such use, repairs, alterations and additions, apply the proceeds thereof to the payment of the principal and interest of all said bonds remaining due and unpaid, *pro rata*," and that the trustees "shall be entitled to receive proper compensation for every labor or service performed in the discharge of said trust, in case they shall be compelled to take possession of said premises, or any part thereof, or to manage the same," the trustees, having taken possession for breach of condition, may, on a bill to redeem, be allowed any sum which is reasonable for their own services, and expenditures authorized by the mortgage, but not for counsel fees in suits between them and the mortgagors, or for insurance procured by them without the request of the mortgagors. *Boston & Worcester Railroad Corp.* v. *Haven*, 359.

19. If a mortgagor of land leases the same for a term of years, and for a certain rent, to a third person, from whom he receives an advancement of money under an agreement that he will expend it in buildings and improvements upon the land, which is accordingly done, the lessee, after judgment has been rendered against him in a writ of entry brought by the mortgagee, cannot be allowed compensation for the buildings and improvements, although he had reason to believe that, under the terms of the mortgage, the mortgagor had a right to execute such a lease, which would be valid as against the mortgage. *Haven* v. *Boston & Worcester Railroad Corp.* 369.

20. In the execution of a power of sale in a mortgage of personal property, the mortgagee has a right, in the exercise of a reasonable discretion, to adjourn the sale from time to time, without doing so through the agency of a licensed auctioneer or giving any new notice to the mortgagor. *Hosmer* v. *Sargent*, 97.

21. If citizens of the United States build a vessel in Nova Scotia for themselves, and without consideration execute a builder's certificate to a citizen of Nova

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Scotia, stating that he is her first purchaser, and he thereupon causes her to be registered there in his name, but never takes possession of her, and afterwards at their request executes a mortgage upon her, with power of sale, to secure advances made to them, and writes upon the mortgage a statement that when she is sold he shall have no claim for any surplus nor be liable for any deficiency, in case she brings more or less than the sum for which she is mortgaged, he retains no attachable interest in her, as mortgagor or otherwise *Spring* v. *Baker*, 267.

22. A mortgage of personal property given to secure such sums as may thereafter become due to the mortgagee is not a valid security, as against a judgment creditor of the mortgagor, for claims accruing after the property was attached in his suit, and the mortgagee summoned as trustee. *Barnard* v. *Moore*, 273.

23. A sale of mortgaged personal property by the mortgagor, with the oral consent of the mortgagee, will convey a good title to the purchaser, although the latter was not at the time informed of the existence of the mortgage. *Stafford* v. *Whitcomb*, 518.

24. The statute provisions regulating the sale of mortgaged property by the mortgagor have no application to the case of a contract between the mortgagee and mortgagor, or between the assignee of one and the assignee of the other. *Hubbard* v. *Lyman*, 520.

See CONTRACT, 3; DOWER; EQUITY, 5; HUSBAND AND WIFE; INSOLVENT DEBTORS, 2, 3; PARTITION; PARTNERSHIP, 1; USURY, 1, 2.

NEGLIGENCE.

1. The court cannot say, on a bill of exceptions, that riding upon the outside platform of a horse railroad car is such a want of ordinary care as to prevent a recovery for an injury sustained by being thrown therefrom. *Meesel* v. *Lynn & Boston Railroad Co.* 234.

2. In an action to recover damages for an injury sustained from a collision upon a highway, the plaintiff must prove that he was in the exercise of ordinary care at the time, although the defendant was travelling with a horse and sleigh, without having three bells attached to any part of the harness. *Counter* v. *Couch*, 436.

3. If in an action against a town to recover damages for an injury sustained by reason of a defective bridge, there is evidence tending to show that the accident happened in consequence of the youth and vicious conduct of the plaintiff's horse, the defendants have no ground of exception to a ruling by the judge that "ordinary care requires a person driving on the highway to do so with a horse which will not, when exposed to ordinary objects and noises upon and along the highway, become unmanageable by a driver of ordinary skill and prudence;" and that, "if a vicious or untrained condition of the horse for ordinary public travel contributed with the insufficiency of the rail to produce the injury, the plaintiff cannot recover." *Bliss* v *Inhabitants of Wilbraham*, 564.

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4. This court cannot decide, on a bill of exceptions, that driving a safe horse, with a tight rein, at night, at his usual speed of ten miles an hour, by a skilful driver, over a wide and level road, with which he is familiar, and over which he has passed in safety within an hour, without perceiving any obstruction, is such a want of ordinary care as to prevent a recovery for an injury sustained from a defective highway. *Reed* v. *Inhabitants of Deerfield*, 522.

See COMMON CARRIER, 3, 4; DOWER; RAILROAD, 1, 4; WAY, 4, 5, 7.

NOTICE.

See EVIDENCE, 15–17.

NUISANCE.

Under Gen. Sts. *c.* 26, § 52, the selectmen of a town, acting as a board of health, may by a general order forbid the exercise of an offensive trade or employment therein, without first giving notice to those who at the time are engaged in carrying on the same. *Belcher* v. *Farrar*, 325.

OFFICER.

See ATTACHMENT, 1; INSOLVENT DEBTORS, 2.

OVERSEERS OF THE POOR.

See PAUPER, 1.

PARTITION.

If one tenant in common of land takes an assignment of a mortgage upon it, his co-tenants, who derive their title as heirs at law of the mortgagor, cannot maintain a petition for partition against him, although the mortgage and assignment are not recorded. *Blodgett* v. *Hildreth*, 186.

PARTNERSHIP.

1. One partner may execute a valid mortgage of a vessel owned by the firm, by signing the individual names of the members of the firm. *Patch* v. *Wheatland*, 102.

2 A member of a firm which consists of more than two persons is liable to his partners jointly for a sum which, upon settlement, he is found to have withdrawn from the joint funds in excess of his share; and one of them cannot maintain an action therefor in his own name alone, although he has an assignment of all the right and interest of his associates in the assets of the firm. *Wiggin* v. *Cumings*, 353.

3. If, upon the dissolution of a partnership, it is agreed that the partners who remain shall take the property and close up the business of the firm, and a final settlement between the outgoing and remaining partners is postponed until the adjustment of the outstanding accounts, and the remaining partners

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subsequently receive upon a particular adventure of the firm an advance which proves to be more than is realized from the adventure, and do not repay the excess, such advance is to be treated, in a suit in equity against the outgoing partner for a settlement, as having been made for the benefit of all the partners. *Tyng* v. *Thayer*, 391.

4. In closing up the business of the firm, under such an agreement, the remaining partners have a right to use their best judgment in incurring such expenses as seem to be reasonable and necessary, and they are entitled to be allowed therefor; nor can it be objected for the first time, at the argument in this court on exceptions to the report of the master to whom the cause has been referred, that the sum allowed by him was greater than the amount claimed in the pleadings. *Ib.*

5. In a suit in equity between partners for a settlement, no final decree can be made while debts due from the firm remain unadjusted, unless the plaintiffs will deduct the amount of such debts from the sum which they seek to recover. *Ib.*

See CONTRACT, 10; PLEADING, 2; WITNESS, 1.

PAUPER.

1 If the municipal authorities of a town have provided supplies for distribution among those out of the almshouse who need relief, upon orders of the overseers of the poor, and have given notice thereof to the overseers, the latter have no authority to contract debts in behalf of the town for the support of the poor; and one who, having knowledge of the facts, furnishes supplies to persons settled in such town, upon orders of the overseers, cannot maintain an action against the town to recover for the same. But if he furnishes supplies upon such orders to persons settled elsewhere, he may recover from the town the amount actually received by it, on account of such supplies, from the towns which were liable to support the persons who were relieved thereby *Ireland* v. *City of Newburyport*, 73.

2. If a person whose settlement is in dispute is proved to have removed from one town to another, a new trial will not be granted on account of the admission of evidence, for the purpose of proving his domicil in the latter town, that he came to the latter town and said that he had sold out at the former town, and had come down and wanted to go to work; provided no special request was made for an instruction to the jury that his declaration was not of itself competent evidence of the fact of his selling out in the former town. *Inhabitants of Monson* v. *Inhabitants of Palmer*, 551.

3. If the parents of illegitimate children intermarry, and the father acknowledges them as his, the children are, by *St.* 1853, *c.* 253, made legitimate to all intents and purposes, and thereupon take the settlement of the father. *Ib.*

PAYMENT.

See COLLATERAL SECURITY, 1, 2.

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PLEADING.

1. A declaration in an action of tort, which alleges that the plaintiff through his agent procured the defendants to furnish and deliver to him a certain article, and that they negligently and carelessly furnished a different article, and that he sustained an injury by the use of the article furnished, believing it to be that which he ordered, is not sustained by proof that the plaintiff bought the article of a third person who obtained it of the defendants. *Davidson* v. *Nichols*, 75.

2. A declaration upon an agreement to discharge the plaintiff from all liabilities on account of certain purchases, as one of a firm recently dissolved, which alleges that a certain note was due from the firm at the time when the agreement was made, is not sustained by proof that such a note was afterwards given for a liability of the firm; but an amendment may be allowed on terms, after the argument of exceptions in this court. *Nichols* v. *Prince*, 405.

3. In an action to recover damages for a trespass, evidence of a license from the plaintiff to do the acts complained of is not admissible, unless specially set up in the answer. *Hollenbeck* v. *Rowley*, 473.

See BANKS; BURDEN OF PROOF; CONTRACT, 8, 9; INDICTMENT; JUDGMENT, 3; PRACTICE, 2; PROMISSORY NOTES, 3; WRIT OF ENTRY, 4.

PLEDGE.

Taking a bill of sale of personal property at a price less than its estimated value, with an agreement that the original owner shall have the same again at any time after a fixed day, upon refunding the price, with a small additional sum for trouble in trying to sell the same, amounts only to a pledge, which is lost by giving possession of the property to the general owner. *Kimball* v. *Hildreth*, 167.

See MORTGAGE, 21.

POOR DEBTORS.

1. If a judgment debtor who has been arrested on an execution in favor of the "Mutual Safety Fire Insurance Company" is brought before a magistrate and desires to have a time fixed for his examination, and enters into a recognizance to the creditors which is erroneously entered of record as running to the "Mutual Life and Fire Insurance Co.," and the magistrate afterwards issues a notice of the time and place fixed for the examination to the creditors, under the same mistaken name, and the notice is sent in a letter to the creditors' attorney, who acknowledges the receipt of it as a notice to the creditors, they cannot object, in an action upon the recognizance, that the notice was insufficient by reason of the mistake, or that it was not duly served. *Mut. Safety Fire Ins. Co.* v. *Woodward*, 148.

2. After a magistrate has announced his decision not to administer the poor debtors' oath to one who has been arrested on execution and examined before him, he has no power to adjourn the case, and the debtor has no right of appeal, and is not bound by his recognizance to appear on any future day to which the case is adjourned. *Russell* v. *Goodrich*, 150.

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3. If a debtor who is arrested on execution and taken before a magistrate enters into a void recognizance, and does not obtain his release according to law, the judgment is not thereby discharged; and the assent of the creditor to the proceeding is not to be inferred from the fact that the magistrate is his attorney. *Brown* v. *Kendall*, 209.

PRACTICE.

1 No exception lies to the refusal of a judge to rule as a matter of law upon a question which involves the determination of facts in dispute. *Pettingill* v. *Porter*, 1.

2. The objection of a variance between the allegations in a petition for a review and the proof at the hearing in the superior court cannot be taken for the first time at the argument in this court upon exceptions. *Hutchinson* v. *Gurley*, 23.

3. If, in an action to recover for breaking and entering the plaintiff's close, consisting of a beach and upland, it appears that the plaintiff has no sufficient title to the beach to enable him to maintain his action for a trespass thereon, and a general verdict is rendered for the defendant, a new trial will not be granted on exceptions, unless it affirmatively appears that the case was submitted to the jury under improper instructions in reference to his right to recover for a trespass upon the land to which he established a title. *Tappan* v. *Burnham*, 65.

4. If on the undisputed facts a verdict was right, this court will not inquire into the correctness of the rulings under which it was rendered. *Kimball* v. *Hildreth*, 167.

5. This court has authority to entertain a petition filed by a third party, representing that a libellant for divorce is insane; and, if such insanity is established, the court will appoint a guardian *ad litem* to conduct the cause for the libellant. *Denny* v. *Denny*, 311.

6. There is no error in the admission in evidence, at the hearing before a master to whom a cause has been referred by this court, of a deposition taken out of the Commonwealth on commission, although it does not appear that all the formalities required in depositions taken within the state were observed. *Tyng* v. *Thayer*, 391.

7. The court cannot take from the jury a case in which the evidence is conflicting, and the testimony of one or more witnesses, if believed, would, taken by itself, support a verdict. *Reed* v. *Inhabitants of Deerfield*, 522.

See EVIDENCE, 14; PARTNERSHIP, 4; REVIEW, 2; WITNESS, 2.

PRESCRIPTION.

See WAY, 12.

PRINCIPAL AND AGENT.

1. Proof that a depositor in a savings bank left her bank book with her mother, for the purpose of enabling the latter to draw out money upon special orders,

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from time to time, and that moneys were at different times deposited and withdrawn by the latter for the former, is not sufficient to authorize a jury to infer an agency on the part of the latter to receive payment of other money due to the former. *Butman* v. *Bacon*, 25.

2. An agency to sell merchandise for another is terminated by the agent's insolvency; and debts arising from sales made by the agent on credit, in his own name, belong to the principal, (subject to legal liens,) although, in pursuance of the agreement between the parties, the agent has rendered monthly accounts of all his sales, and given notes or acceptances to the principal for the cost of the merchandise at wholesale prices, taking a receipt, containing a promise to account for the same at maturity. *Audenried* v. *Betteley*, 302.

3. If the assignees in insolvency of an agent, who has sold merchandise for another in his own name, on credit, know that the principal claims the debts, and nevertheless proceed to collect them, they are not entitled to retain compensation for their own services, or for expenses incurred in good faith, in making the collection. *Ib.*

See PROMISSORY NOTES, 4; TOWN, 2.

PROBATE COURT.

See HOMESTEAD, 3.

PROMISSORY NOTES.

1. If a promissory note is given payable by instalments, "with interest on the said sum," no interest is due upon the last instalment until the instalment becomes due. *Saunders* v. *McCarthy*, 42.

2. In an action on a note that is made payable absolutely, evidence is not admissible to prove an oral agreement, when the note was made, that it should remain in the payee's hands, to be paid out of certain moneys which he expected to receive for the maker, and not otherwise. *Currier* v. *Hale*, 47.

3. If a promissory note is made payable to the treasurer of a parish or his successor, without naming him, a declaration upon the note which alleges that at the time when it was given the plaintiff was the treasurer of the parish, and that it was payable to himself, is not demurrable, although an indorsement upon the note, which is copied as a part of the declaration, appears to have been made by a successor to the plaintiff in the office. *Buck* v. *Merrill*, 123.

4. A note in this form: "$23.00. Lee, April 26, 1858. On demand, I, as treasurer of the Congregational Society, or my successors in office, promise to pay A. B. or order twenty-three dollars, value received, with interest. S. S. R., Treasurer," is the note of the society, if the treasurer had authority to bind them by it. *Barlow* v. *Congregational Soc. in Lee*, 460.

5. The holder of a promissory note, who receives notices of its non-payment and protest for the indorsers, is bound to forward them by the earliest practicable post after the day on which he receives them. *Haskell* v. *Boardman*, 38.

6. Indorsers of a promissory note do not waive notice of its non-payment by taking from the maker a mortgage of all his property, with a general condition to

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save them harmless from all contracts entered into by them for him, and by selling the property under a power of sale contained in the mortgage, for breach of condition. *Ib.*

7. Joint payees of a note who indorse it are joint and not successive indorsers, and either of them is entitled to share in a security taken from the principal debtor by the other. *Lane* v. *Stacy*, 41.
8. In order to charge an indorser of a joint note, a demand must be made upon all the promisors by some one who has the note with him at the time, unless special circumstances are shown to excuse its absence. *Arnold* v. *Dresser*, 435.
9. Such demand is not waived by a promise by the indorser to pay the note, if at the time of making the promise he is erroneously informed by the holder that a due demand has been made upon the promisors. *Ib.*

See COLLATERAL SECURITY, 1, 2; CONTRACT, 9; TOWN, 2; WILL, 3.

RAILROAD.

1. Crossing a railroad track without looking to see if a train is coming is not conclusive proof of a want of care; and if it appears that there is a double track, and a person has just bought a ticket at a station for a train which is to pass upon the further track, and the station agent says to him, "The train is coming; we will cross over," and he attempts to follow the agent, upon the premises of the railroad company, to take his place in the train, which meanwhile has arrived, and, in crossing over the nearer track for that purpose, is struck by a train coming from the other direction, and partially behind him, which he did not look for or see until too late to save himself, it is proper to submit it as a question of fact for the jury to determine whether he was careless. And while so going from the ticket office to take his seat in the cars he is to be considered as a passenger, and is entitled to the rights of a passenger; and it is the duty of the railroad company to use the utmost care and diligence in providing for him a safe and convenient way and manner of access to the train, and in preventing the interposition of any obstacle which would unreasonably impede him or expose him to harm while proceeding to take his seat in the cars, in order to prevent those injuries which human care and foresight can guard against. *Warren* v. *Fitchburg Railroad Co.* 227.
2. A railroad company which so constructs its track at the crossing of a highway as to render the highway dangerous or inconvenient to travellers thereon is liable for an injury sustained by a traveller upon the highway, in consequence of the defect, although he might also have a remedy against the town which was bound to keep the highway in repair. *Gillett* v. *Western Railroad Corp.* 560.
3. A railroad company may be held liable for an injury to one of its servants, which is caused by a want of repair in the road-bed of the railroad. *Snow* v. *Housatonic Railroad Co.* 441.
4. If it is the duty of a servant of a railroad company to uncouple the cars of a train, and this cannot easily be done while the train is still, and he, in endeavoring to uncouple them while the train is in motion, steps between the cars

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and meets with an injury which is caused by a want of repair of the road-bed of the railroad, the court cannot rule as matter of law that he was careless, but should submit the question to be determined by the jury; although he continued in the employment of the company after he knew of the defect. *Ib.*

5. Under the statutes of this commonwealth, a railroad company which has leased its railroad to another company, with stipulations that the whole transportation of passengers and freight upon the railroad shall be done by the lessees, is responsible in damages for buildings upon its route, which are destroyed by fire communicated by a locomotive engine owned and used upon the railroad by the latter company. And it is immaterial that one of the buildings was destroyed by the spreading of the fire from other buildings, and that, by consent of the railroad company, it stood partly within the location of the railroad. *Ingersoll* v. *Stockbridge & Pittsfield Railroad Co.* 438.

6. The authority conferred on the West Roxbury Railroad Company by *St.* 1856, *c.* 201, to construct and maintain a railway over certain streets in West Roxbury was not revoked or repealed by *St.* 1858, *c.* 38, § 10. *Dedham & West Roxbury Railroad Co.* v. *Metropolitan Railroad Co.* 279.

See TAXES, 4.

RECOGNIZANCE.

1. An action of contract upon a recognizance need not be brought in the same court in which the recognizance is entered of record. *Curtice* v. *Bothamly*, 336.

2. If a married woman appeals from a judgment of a police court against her, in a personal action, and enters into a recognizance to prosecute her appeal, the recognizance is valid, although it shows upon its face that she was a married woman, and does not show facts sufficient to establish her liability in the action. *Ib.*

3. The surety in a recognizance given to prosecute an appeal from a judgment of a police court is not discharged by the plaintiff's subsequent release of his attachment upon the writ. *Ib.*

See POOR DEBTORS, 3.

RELEASE.

See MORTGAGE, 2.

REPLEVIN.

1. A plaintiff in replevin cannot maintain his action simply by showing that since it was commenced the defendant has gone into insolvency, although the assignee does not appear and take upon himself the defence. *Hallett* v. *Fowler*, 93.

2. It is not necessary, in a writ of replevin, which is directed to a deputy sheriff, to allege the value of the goods to be replevied. *Pomeroy* v. *Trumper*, 398.

3. A defendant in replevin, who has prevented the officer from delivering the

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replevied property to the plaintiff by attaching it upon a writ in his own favor, cannot object to the prosecution of the replevin on the ground of such non-delivery. *Ib.*

4. It is no ground for dismissing a writ of replevin, that an animal described in the writ as a heifer is described in the certificate of appraisement as a cow; or that the plaintiff has caused the officer, to whom the writ was comm'tted, to bring an action against the defendant and another officer for taking the replevied property out of his hands, before its delivery to the plaintiff; or that the plaintiff, as executor, has commenced an action against the defendant and his officer for the conversion of the replevied property, if it does not appear that the conversion relied upon was the same act for which the replevin was brought. *Ib.*

See JUDGMENT, 1.

REVIEW.

1. A review of a judgment rendered by a justice of the peace may be granted on the ground that the party against whom it was rendered intended to appeal and thought he had appealed. *Hutchinson* v. *Gurley*, 23.

2. This court will not, in the exercise of its discretion, under Gen. Sts. *c.* 146, § 21, grant a review of a judgment rendered in the superior court, after a trial had by order of the judge, if the party aggrieved was heard upon the question of postponing the trial, and had an opportunity afterwards to apply to the same court for relief, and to present all the facts upon which the petition for review is founded, and if there is not clear proof of misapprehension, corruption or incapacity on the part of the judge. *Converse* v. *Carter*, 568.

REWARD, OFFER OF.

See TOWN, 3.

SALE.

1. A merely colorable sale of goods gives no such title to the pretended purchaser as will enable him to maintain an action for their price against a subsequent purchaser. *Bradley* v. *Hale*, 59.

2. A sale on execution of a heifer which is exempt from attachment, after notice that her owner claims her as exempt, will pass no title to the purchaser. *Johnson* v. *Babcock*, 583.

See CONTRACT, 5; MORTGAGE, 20.

SELECTMEN.

See NUISANCE; TOWN, 3

SEWER.

See ACTION, 1.

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SHERIFF.

No action lies against a sheriff upon a judgment recovered against his deputy. *Pervear* v. *Kimball*, 199.

SHIP.

A lien on a ship will be dissolved if the person claiming it knows that large credits exist, which exceed a certain sum, and knows very nearly though not exactly their amount, but gives no further account of them, in his statement, than that such credits exist, to an amount which is not known and cannot be computed by him; or if in his statement he says that the owner of the vessel is unknown, when he has been informed and believes that she was owned by the person who in fact owned her. *Story* v. *Buffum*, 35.

See MORTGAGE, 21.

SOLDIER.

1. Merely signing a paper in the hands of a municipal officer, containing a promise to serve as a volunteer for three years from the date of being mustered into the United States service, unless sooner discharged, is not sufficient to constitute one a soldier, and render him liable to be seized against his will and taken into camp; and for such a seizure by municipal officers and their agents, he may maintain an action against them, and may prove, in aggravation of damages, his mental suffering caused by the injury, and also the fact of his confinement in the guard tent, upon and immediately after being taken into camp. *Tyler* v. *Pomeroy*, 480.

2. In such action, votes of the town where the plaintiff lived and signed the paper referred to, instructing the selectmen to cause all enlisted men to be taken to camp, the plaintiff's declaration and acts showing his intention to enlist as a soldier, and the facts that others who signed the same paper with the plaintiff entered into the military service, that the paper signed by the plaintiff was in the usual form for enlisting recruits, and that persons who signed such papers were usually held to military service, are alike incompetent. *Ib.*

3. If in such action one of the defendants has denied on cross-examination that he said, after the seizure of the plaintiff, "We have got him, and I hope they will send him to Fort Warren," the plaintiff may introduce evidence to contradict him. *Ib.*

See TOWN, 1.

SPIRITUOUS AND INTOXICATING LIQUORS.

1. If the selectmen of a town who appoint an agent for the sale of intoxicating liquors, under *St.* 1855, *c.* 215, § 5, agree with him that the amount of his compensation shall depend upon the amount of sales, no action can be maintained against him by the town for a failure to account for the proceeds of the business, although he executed a bond as agent, in the form required by the statute. *Inhabitants of Washington* v. *Eames*, 432.

2. A license granted under St. of U. S. of 1862, *c.* 119, does not authorize the sale of intoxicating liquors in this commonwealth, in violation of the statutes

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of this commonwealth, although such sale is only incidental to the seller's main business. *Commonwealth* v. *O'Donnell*, 548.

3. Keeping a tenement used for the illegal sale and illegal keeping of intoxicating liquors, and being a common seller of intoxicating liquors during the same time and at the same place, are distinct offences, and a conviction for one is no bar to an indictment for the other, although the same acts are relied upon in proof of both charges. *Ib.*

4. If, on the trial of an indictment for being a common seller of intoxicating liquors, there is proof of sales of such liquors by the glass, in the defendant's dwelling-house, to be there drunk by the purchasers, a new trial will not be granted, after a verdict of guilty, although the judge erroneously refused to rule that it was incumbent on the Commonwealth to prove a want of authority in the defendant to make such sales. *Commonwealth* v. *Cashman*, 580.

See CONTRACT, 5.

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STREET RAILROAD.

See NEGLIGENCE, 1; TAXES, 4.

SURETY.

See RECOGNIZANCE, 3.

SURVEYOR.

See WAY, 1, 2.

TAXES.

1. The *St.* of 1863, *c.* 218, providing for the reimbursement of bounties paid by cities and towns to volunteers, and apportioning and assessing a tax therefor, will not be declared invalid on the ground that the tax which it imposes is disproportionate and unequal, or that the sums to be raised under the same are to be unequally distributed among cities and towns, or that the legislature have no authority to raise money by taxation for the payment of bounties to soldiers of the United States, or to reimburse bounties already paid to them by cities and towns, or that it is apparent from the statute itself that the legislature did not intend that a tax should be levied under it. *City of Lowell* v. *Oliver*, 247.
2. This court cannot say that a city or town may be excused from levying a tax according to the requirement of *St.* 1863, *c.* 218, on the ground that an insufficient time was allowed for the assessment and collection thereof, although the warrant for the tax was not received from the state treasurer until the ordinary taxes of such city or town had been assessed and committed to its treasurer for collection. *Ib.*
3. Under Gen. Sts. *c.* 15, § 32, the governor may instruct the state treasurer to withhold the payment of a portion of a sum of money due to a city or town, after he has, with the advice of the council, executed and delivered to the treasurer a warrant for the payment thereof, if such city or town illegally withholds money due to the Commonwealth. *Ib.*
4. An incorporated street railroad company is not taxable for horses or other personal property used in and necessary for the prosecution of its business. *Middlesex Railroad Co.* v. *City of Charlestown*, 330.

TENANT IN COMMON.

See PARTITION.

TOWN.

1. The *St.* of 1863, *c.* 38, does not legalize a vote of the inhabitants of a town to pay money to persons who had already enlisted in the service of the United States. *Fowler* v. *Selectmen, &c. of Danvers*, 80.
2. If the inhabitants of a town have authorized their treasurer to borrow a certain sum of money for a specific purpose, and to give his note as treasurer therefor, and he has exercised this authority, they are not liable upon a note

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given by him in their name for money subsequently borrowed by him and converted to his own use, although he assumed to be acting under the authority conferred upon him, and the lender supposed that he was doing so. *Lowell Five Cents Savings Bank* v. *Inhabitants of Winchester*, 109.

3. Selectmen of a town have no authority to bind the town by an offer of a reward for the apprehension and conviction of a person who has not been charged with a crime by a complaint or indictment. *Day* v. *Inhabitants of Otis*, 477.

See ACTION; PAUPER, 1; SPIRITUOUS AND INTOXICATING LIQUORS, 1; WAY, 6.

TREASURER

See TOWN, 2.

TRESPASS.

1. An open, peaceable, adverse and exclusive possession of land which has been discontinued as a highway, under claim of title, is sufficient to support an action for trespass, against all persons who have not a better title. *Bowley* v. *Walker*, 21.

2. One who has gone upon an open beach and removed seaweed therefrom for a number of years, and during the same time has allowed other persons to enter upon it and remove seaweed, does not thereby acquire such a possession as will enable him to maintain an action for a trespass upon the same; especially against one who has entered under a license from the town, which, prior to the plaintiff's entry thereon, had been in possession of the same, and has never abandoned such possession. *Tappan* v. *Burnham*, 65.

3. If the plaintiff in an action of tort in the nature of trespass *quare clausum* has testified that he was in the occupation of the premises, without being inquired of or testifying as to any title thereto, proof of a recent deed to his wife, to her sole and separate use, is not sufficient of itself to authorize the court to instruct the jury that the plaintiff had not such a title as to enable him to maintain his action. *Brown* v. *Benjamin*, 197.

See INSOLVENT DEBTORS, 6; JUDGMENT, 3; PRACTICE, 3; WAY, 13.

TRUST.

See WILL, 2.

TRUSTEE PROCESS.

See MORTGAGE, 22.

USURY.

1 In a suit to foreclose a mortgage, the mortgagor is entitled to the benefit of the statute penalty for usury in reduction of the sum for which conditional judgment is entered. No deduction, however, is to be made for usury paid under a verbal agreement, which is not incorporated into the written contract. *Minot* v. *Sawyer*, 78.

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2. If, in a suit to foreclose a mortgage, a deduction is made, in entering conditional judgment, from the sum payable by the terms of the contract, on account of usury, the defendant is entitled to recover his full costs. *Ib.*

3. If a person who obtains discounts at a bank voluntarily allows a sum to remain on deposit with the expectation that this course will enable him to obtain discounts more readily, but without any agreement or understanding that he may not draw his money at any time, there is no usury in the practice. *Appleton Bank* v. *Fiske*, 201.

WAIVER.

See DEPOSITION, 1; PROMISSORY NOTES, 6, 8.

WARRANTY.

See CONTRACT, 5.

WAY.

1. It is the duty of a highway surveyor, under Gen. Sts. *c.* 44, § 14, if he has not sufficient means to repair a highway in his district, to make a formal application to the selectmen for their written consent to the employment of persons to repair the same, so that it shall be safe and convenient, although he may have reason to believe that they will refuse to give it; and if he does not do so within a reasonable time, he cannot recover for an injury sustained by reason of a defect in such highway. *Todd* v. *Inhabitants of Rowley*, 51.

2. A highway surveyor has no authority to expend any portion of the money committed to him for the repair of highways in changing the line of travel and constructing a new road; and if he does so, and thereby exhausts his funds with which he might have repaired the roads already in use, he cannot recover for an injury sustained by reason of a defect in a highway within his district, which he might have repaired by the proper application of the funds. *Ib.*

3. If, in an action to recover for an injury sustained by reason of a defective way, it becomes a material question whether the plaintiff's horse had a habit of shying at the time of the accident, the defendants, after introducing evidence of instances of his shying before that time, may also prove similar instances afterwards. *Ib.*

4. If, in an action to recover for damages sustained by falling upon the ice on a sidewalk, it becomes a question whether the defendants had taken reasonable pains to remove the ice, the plaintiff may show that in other places on the same sidewalk, similarly situated, the ice had been removed with a shovel only. *Shea* v. *City of Lowell*, 136.

5 A person who voluntarily attempts to pass over a sidewalk which he knows to be very dangerous, by reason of ice upon it, when he might easily avoid it, cannot maintain an action against the town which is bound to keep the way in repair, to recover for injuries sustained by falling upon the ice. *Wilson* v. *City of Charlestown*, 137.

6. A person who, while using a highway simply for the purpose of play, meets

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with a personal injury by reason of a defect therein, cannot maintain an action to recover damages therefor against the city or town which is bound to keep the same in repair. *Blodgett* v. *City of Boston*, 237.

7. If a private way is opened, leading from a public street, and prepared for use in the same manner as a public street, and with nothing to show that it is not such, the public may lawfully travel over it, although it is closed at one end; and in so doing they are bound only to the same degree of care, in respect to others who are also lawfully using it, as in travelling over public streets. *Danforth* v. *Durell*, 242.

8. Establishing an alteration in a way, upon a petition praying that it may be widened and straightened, is in law a discontinuance of those portions of the way which do not come within the newly assigned limits; and no special order of discontinuance is necessary. *Bowley* v. *Walker*, 21.

9. A grant of a right of way, with horses, carts and other vehicles, "to a street forty feet wide, and in, over and through said forty feet street," which street is owned by the grantor, and has been laid out by him between his lots, and is so situated that there will be much passing over the same, gives a right of way in the entire space of that width; and the grantee may maintain an action for damages, if the grantor or those claiming under him afterwards obstruct his convenient use and enjoyment of any part thereof. *Tudor Ice Co.* v. *Cunningham*, 139.

10. If there is no competent record evidence of the laying out of a highway, and it appears that surveyors have been unable to ascertain the boundaries accurately, evidence of the existence of a fence substantially in the same place for more than twenty years, upon the side of the highway, is competent for the purpose of fixing the boundary line. *Hollenbeck* v. *Rowley*, 473.

11. Ordinarily a deed of land bounded by a highway conveys the land, subject to the easement of the public, to the centre of the highway. *Ib.*

12. A private individual may be held liable as a trespasser by the owner of land over which there is a public highway, for acts done to the injury of the latter in widening or repairing the highway, outside of the travelled part thereof; although a highway surveyor might properly have done the same acts. *Ib.*

13. If the purchaser of land over which there is a right of way by prescription interrupts the way, and his grantor thereupon changes its course, with the intention of making it pass over his own adjoining land, but in fact makes it by mistake to pass over the granted premises, the right of way over the new route will continue, if accepted by those having the right of way, and assented to by the purchaser of the land, but not otherwise; and if the purchaser is under the same mistake as to the boundaries of his land, and supposes that the new route does not pass over the same, his silence will not justify the inference that he intends to permit the new route to pass over his land. *Gage* v. *Pitts*, 527.

See ACTION, 2; EASEMENT, 1; EVIDENCE, 9; NEGLIGENCE, 3, 4.

WEST ROXBURY RAILROAD COMPANY.

See RAILROAD, 6.

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WILL.

1. A testator commenced his will as follows: "I, A. B., being about to go to Cuba, and knowing the danger of voyages, do make this as my last will and testament, in manner and form following: First, if by casualty or otherwise I should lose my life during this voyage, I give and bequeath to my wife," &c.; and afterwards gave independent bequests, and spoke of the instrument as his last will and testament. He made the voyage and returned in safety, and afterwards died. *Held*, that the will should be admitted to probate. *Damon* v. *Damon*, 192.

2. A testator who died leaving a wife and several children devised the residue of his estate, real and personal, in trust, to pay a certain sum annually to his wife, for her sole and exclusive use, and to pay over from time to time to his wife "such sums of money annually as to my wife and the said trustee shall seem to be necessary for the maintenance of my family, and the support and education of my children;" and after her death to divide the trust fund equally among all his children, and the representatives of any deceased child or children, and to pay over and convey the same to them as follows: the portions of his sons to them as they should severally become of age; and the income of the portions of his daughters to them during their lives, and after their deaths the principal of each to her heirs at law. He also directed the trustee to retain the dwelling-house for the use and occupation of his widow and family. All of the children afterwards died without issue; the dwelling-house was sold; and the testator's wife ceased to keep house. *Held*, that a termination of the trust might be decreed; that the widow was no longer entitled to receive the sum directed to be paid to her for the maintenance of the family; and that the children took a vested interest under the will. *Bowditch* v. *Andrew*, 339.

3. If a testator by his will, executed in his last sickness, creates a fund and directs the trustees thereof to pay over to each of his children a certain sum, but provides that "any legal debt due from either of said children to my estate at the time of my decease shall first be deducted by said trustees, and the balance only be paid over to such child as aforesaid," a married daughter is entitled to receive the whole sum so directed to be paid, without deduction, although she had signed notes with her husband to her father for moneys furnished to her husband by her father, which the latter held at the time of the execution of the will and of his death, and upon which he had collected interest in his lifetime, and which he included in a memorandum of his assets, and although for other sums advanced by him to her and to others of his children he had taken no notes and made no charge, and no debts were due to him from any of his children, unless these notes and a similar one executed by another married daughter and her husband are to be regarded as such. *Rogers* v. *Daniell*, 348.

4. If a testator directs the trustees of a fund created by his will to pay over to each of his children a certain sum, an action at law may be maintained by one of the children to recover the same, if the fund is sufficient, and the only

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matter in dispute is whether the legacy is subject to certain deductions under another clause of the will. *Ib.*

5. A testator, who died leaving a wife and three children, by his will directed that his personal property should be applied to the payment of his debts and the removal of incumbrances upon his real estate; "that my property, when thus consolidated in real estate, may thus remain during the lifetime of my wife and of each of my children, and, at the decease of the last surviving one of them, that said property may then [after certain specific legacies] be divided between my surviving legal heirs, each receiving an equal portion of the same." By a codicil, he directed that the income of his real estate should be divided into four equal parts, of which one should quarter-yearly be given to his wife and one to each of his children; that after five years from the date of his decease, at any time when his legal heirs should unanimously agree, his property might be divided into equal shares, not disposing of the real estate any further than necessary, but retaining it in the possession of his heirs, one share for his wife and one for each child, and being thus divided should be placed in the hands of trustees, in trust for his wife and children. The widow waived the provisions of the will in her behalf, and the specific legacies were paid or secured. *Held*, that the children took a vested interest in the estate, in fee simple. *Lane* v. *Lane*, 350.

WITNESS.

1. In an action against the surviving partner of a firm, the plaintiff is a competent witness. *Brady* v. *Brady*, 101.

2. Evidence that a party to a suit was, at the time of the trial, nearly seventy years old, had had a paralysis within three years, was of weak mind and poor memory, had an idiotic look, was sometimes stupid, but brighter some days than others, and that on one occasion within a few days of the trial he was unable to move or dress himself and did not seem to understand anything about his business, does not so clearly show that he was insane, within the meaning of Gen. Sts. *c.* 131, § 14, as to require this court to grant a new trial on account of the admission of the other party to testify in his own favor *Doud* v. *Hall*, 410.

WRIT OF ENTRY.

1. An ancient vote of proprietors of common lands, granting the same, is *prima facie* evidence of title and seisin. *Gloucester* v. *Gaffney*, 11.

2. If the demandants in a writ of entry claim title under a vote of proprietors of common lands, passed in 1732, granting all the common land between two designated houses, proof of the position of the houses, and that at the earliest period within the memory of living witnesses there was a lot between them lying open and in common, is sufficient to authorize a jury to find that it is the lot granted by the ancient vote. *Ib.*

3. If one in possession of land as a disseisor has died insolvent before his adverse possession had continued for twenty years, the purchaser of the land at a sale by his administrator for the payment of debts will be entitled to hold it

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against his devisee, who has entered under the devise and continued in possession until the expiration of twenty years from the original disseisin, although such license and sale were after the expiration of the twenty years. *Peele* v. *Chever*, 89.

4. If a writ of entry is brought by two demandants, and they prove a good title in themselves jointly at a period prior to the date of the writ, the tenant, under a plea of *nul disseisin*, may show that subsequently, and before the date of the writ, one of them conveyed his title to the other. *Patten* v. *Adams*, 204.
5. If, after a grant of land upon a condition subsequent, the estate of the grantor is assigned under the insolvent laws of this commonwealth, the grantor cannot thereafter maintain a writ of entry to recover possession of the granted premises for a breach of the condition. *Stearns* v. *Harris*, 597.

See ERROR, 1.

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